

Volume 3

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE EDWARD M. CHEN, JUDGE

IN RE TESLA, INC. SECURITIES)
LITIGATION.) No. 18-cv-04865-EMC
)

San Francisco, California
Friday, January 20, 2023

TRANSCRIPT OF TRIAL PROCEEDINGS

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(Appearances continued, next page)

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Friday, January 20, 2023

8:01 a.m.

P R O C E E D I N G S

(The following proceedings were held outside of the presence of the Jury)

THE COURTROOM DEPUTY: Court is now in session, the Honorable Edward M. Chen presiding.

Court is calling the case In Re Tesla Inc. Securities Litigation, Case No. 18-4865. Counsel, please state your appearances for the record, beginning with plaintiff.

MR. PORRITT: Good morning, Your Honor. Nicholas Porritt of Levi & Korsinsky on behalf of the plaintiff and the class. And, with my team from Levi & Korsinsky.

THE COURT: Thank you, good morning.

MR. PORRITT: And we'll spare individual introductions today.

MR. SPIRO: Good morning, Your Honor. Alex Spiro of Quinn Emanuel on behalf of defendants.

THE COURT: All right. Thank you, Mr. Spiro.

Let's address the things that we need to address prior to certain witnesses going on, coming on. I do want to start with the issue about whether I should issue a proposed instruction that I sent, delivered to you, I think early this morning, in response to the plaintiff's filing.

And I want to get your comments. And I will tell you that my view at this point is that without some instruction, I think

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1 the jury may get confused because it appears that there's going
2 to be testimony from Mr. Musk to the effect that, you know,
3 what he said was essentially true, that there was -- from what
4 I can see from the evidence, I anticipate it will be something
5 along the lines of there was a series of communications and
6 interest and engagement between PIF and Tesla and he, and so --
7 and the sum and substance of it all I think was argued by
8 Mr. Spiro's opening, "Funding secured" was sort of shorthand
9 for "It's in the bag" kind of thing. Which I've already ruled
10 was not true. Technically not accurate.

11 So the jury has been instructed that they are to assume
12 that those statements, the two tweets, were untrue. But if --
13 if it appears that there's going to be a bunch of evidence
14 coming in suggesting to the contrary, I think the jury may get
15 confused.

16 Now, any attempt to sort of say well, we should restrict
17 testimony and restrict Mr. Musk from saying anything that
18 contradicts the Court's order because there are issues of --
19 two issues, it seems to me. His knowingness or not, which is
20 still at play; his state of mind with respect to knowing.
21 Therefore he truly believed, for instance, that funding was
22 secured in every sense of the word. Even if it means he wasn't
23 even -- in his mind he wasn't even at the level of
24 recklessness, seems to me relevant.

25 It also seems potentially relevant to materiality because

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1 one of the aspects of materiality is you compare what was
2 represented to the actual state of affairs. At that delta
3 between those two, the size of that delta seems to me, one of
4 the factors of materiality and how important it was and whether
5 it impacted.

6 And so this is fairly subtle stuff, and without an
7 instruction to make sure the jury knows that it's coming in for
8 certain issues and not other issues, I think is important to,
9 to minimize juror confusion.

10 So I'll take comments.

11 **MX. KIM:** Your Honor, I apologize for the
12 introduction. This is Liz Kim, Conrad Metlitzky Kane, on
13 behalf of third party Mr. Egon Durban and Silver Lake.

14 We have an issue, an urgent issue that involves
15 confidential documents that the Court had ordered sealed that
16 the parties nonetheless filed unredacted on the docket, and now
17 propose to use as an exhibit for at least one if not both of
18 the witnesses today, so I assume the Court would like to take
19 that issue up after this instruction issue.

20 **THE COURT:** Yep. Parties respond?

21 **MR. SPIRO:** Which issue do you --

22 **THE COURT:** Let's -- since she's here, let's talk
23 about that issue then. If it's coming up soon, we had better
24 deal with that.

25 **MR. SPIRO:** Yeah, so it won't come up on the first

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1 witness today, and I don't believe it's going to come up on the
2 second witness today.

3 **MR. PORRITT:** (Inaudible)

4 **MR. SPIRO:** Right. So just to give the Court --

5 **THE COURT:** In that case let me ask, have you met and
6 conferred at all? Have you -- do you have a position, just on
7 whether or not these should be placed under seal?

8 **MR. SPIRO:** Some of -- there may be some, but there
9 aren't as many as the third-party witness would like. Because
10 it's a public trial, and some of this -- some of these issues
11 are relevant. So the problem is there's a disconnect that we
12 are going to need the Court's guidance on. I think the Court's
13 going to -- this is not really an issue, I don't think, between
14 plaintiff and defense here.

15 **MR. APTON:** I agree with Mr. Spiro.

16 **THE COURT:** Okay. So have you met and conferred to go
17 over which documents you can agree on.

18 **MR. APTON:** Your Honor, I spoke with Mx. Kim
19 yesterday. And one of the issues, the issue that we're dealing
20 with right now, is this Exhibit 179 and 201 which is relevant
21 to today, essentially for Mr. Musk's testimony. And these are
22 presentations from Silver Lake about capitalization for the
23 potential go-private, how the Saudi PIF could fit into that
24 transaction. And what Silver Lake is proposing, is that broad
25 swaths of these documents are fully redacted and it effectively

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1 renders the document useless. And so it's a problem. And as
2 Mr. Spiro said, this is a public trial. We need these
3 documents to cross-examine the witness.

4 **THE COURT:** All right. Let's take it up -- I know
5 you're here, but I've got other things to do right now.

6 **MX. KIM:** Okay.

7 **THE COURT:** It's not going to come up during the first
8 session; we'll take it up during the break.

9 **MX. KIM:** Sounds good, Your Honor.

10 **THE COURT:** All right.

11 **MR. SPIRO:** On the other issue that the Court brought
12 up, you know, first, I just feel the need to sort of say at the
13 outset, you know, I must have said a half a dozen or more times
14 the statement was untrue. I think I said it more times than
15 the plaintiff did.

16 So it strikes me that, as I hear the Court's reasoning,
17 it's this concern of how to deal with the issues that could
18 come up during Mr. Musk's testimony. So it's really a
19 proactive approach.

20 You know, at the outset I'd also say that, you know,
21 courts are reluctant to give instructions, they were just
22 instructed yesterday or the last court day, and are generally
23 reluctant to instruct mid-trial. And I think for good reason.
24 Especially when you're in a proactive perspective situation. I
25 think there's an easy solution for this and I was going to

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1 address it on my own before the Court raised the idea of in
2 instruction, which is just simply this.

3 They can't ask Mr. Musk a trapping question of "Is it
4 true," because that's an impossible question in this case and
5 it's an irrelevant question in this case. The reason it's
6 irrelevant, taking the second point first, is the Court said
7 it's not true. That's it. It's done.

8 The second reason that it's an impossible question is --
9 the answer is Mister -- it was true to Mr. Musk. So he has no
10 way to answer that question that comports with the Court's
11 ruling and comports with the truth. So he can't testify under
12 oath and be asked a trapping question, that violates the
13 Court's order. So the way this should work, in my view, is
14 they don't ask that question. It's a fact. It's not true.

15 **THE COURT:** I thought the fear was you were going to
16 elicit testimony on cross or if we call it direct, about, to
17 listing all the things that suggest -- you don't have to ask
18 the magic question, but everything that suggests indeed it was
19 secured because of the representations from PIF, the
20 engagement, the excitement, the "We're interested," dollar
21 signs, et cetera, so all of these exhibits that you seek to
22 admit -- that I'm going to allow, by the way, for the most
23 part -- you know, it's going to be taken as: Oh, well, maybe
24 funding was secured.

25 **MR. SPIRO:** But, but the -- again, that goes to

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1 materiality. It doesn't go to that issue. And number two --

2 **THE COURT:** Yeah, that may be apparent to you and me.

3 **MR. SPIRO:** But the Court has --

4 **THE COURT:** What's the problem with letting the jury
5 know this is maybe relevant to materiality, and I took pains to
6 make sure I understand what part of materiality that it could
7 be relevant to, to his knowingness or not, and not to falsity
8 or not, which is an issue that they're not to concern
9 themselves with. This guides their attention. And, I
10 studiously avoided reckless disregard, as you will note.

11 **MR. SPIRO:** And I appreciate it. And I could tell.
12 And I appreciate that we received this very late at night, and
13 how hard the Court's working, genuinely, because I can tell
14 that the Court considered all aspects when making this
15 proposal.

16 Let me just not lose my thread, which is just simply:
17 Does the Court agree that they should not be allowed to ask the
18 trapping question that has --

19 **THE COURT:** Well, what is the trapping question? I'm
20 not sure I get it.

21 **MR. SPIRO:** "Is that true, Mr. Musk? 'Funding
22 secured.' Is that true?" It's irrelevant --

23 **THE COURT:** I'm not sure I see the relevance of that
24 question. They can ask, "Did you believe it was true at the
25 time?"

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1 **MR. SPIRO:** Agreed. So therefore, we are on the same
2 page with that. So moving to this issue, again, just to say it
3 again, courts are loath to instruct -- I think it's problematic
4 to instruct right before a key witness in a case testifies --

5 **THE COURT:** And my proposal, by the way -- I should
6 clarify. To avoid that precisely I would give that at the very
7 outset. So it's not key to Mr. Musk. As far as the jury
8 knows, it might be relevant to Mr. Subramanian or whoever else.
9 It's a general instruction.

10 **MR. SPIRO:** And I hear the Court's leanings on that.
11 And so what I would ask is -- there was one word in the
12 instruction that we think is not the right word.

13 **THE COURT:** Okay.

14 **MR. SPIRO:** And if the Court were to accept that
15 singular edit and give it at the beginning, I don't have -- I
16 would withdraw my objection, in theory. With one -- two other
17 caveats we're requesting.

18 One is, any time a court instructs the jury on an element,
19 they have to instruct the jury on the burden of proof. The
20 plaintiff has the burden to prove. That is hornbook, and I
21 would ask the Court to do that as well.

22 The second thing is if we're going to do this, then we
23 would urge the Court to also give a brief instruction on expert
24 witnesses. This is a case where a few things are happening all
25 at once that are highly unusual. You have got a court that's

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1 made a summary-judgment ruling about things that are related to
2 facts. You know, I don't want to digress into that, but there
3 is this summary-judgment ruling.

4 Two, before any factual witness testifies, they're calling
5 an expert witness who wasn't there, who is -- I mean -- yeah.
6 So all I'm asking is with those caveats, and hearing the
7 Court's thinking on this, um, that's what we would ask.

8 So the only change in the instruction -- and it's really
9 just to keep it consistent with what you said in the beginning,
10 and what we've relied on, frankly, in picking a jury and
11 opening and my comments to the jury, what is consistent with
12 your final instructions, is you just, you keep saying the word
13 "untrue," the statements were untrue, the statements were
14 untrue. That's fine. I said that, you said that. Plaintiff
15 said that. You then switch words to "misrepresentation."

16 And all I'm asking is that that word be "statement," like
17 every other word is "statement."

18 **THE COURT:** So that -- the "untrue statements" instead
19 of "misrepresentations."

20 **MR. SPIRO:** Yes. So with that edit, the burden of
21 proof -- and I'm specifically requesting a minor instruction
22 which we have created about expert witnesses because, again,
23 they are waiting to hear what happened, and a person who
24 doesn't have a clue of what happened is about to walk in, give
25 his credentials and tell them what happened.

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1 And so I think given that, given the summary-judgment
2 ruling, given how early in the case the expert is testifying --
3 and he is testifying this early in the case, right before
4 Mr. Musk, Your Honor, for that very purpose. That is what's
5 going on.

6 **THE COURT:** All right, so the instruction, I already
7 have the standard expert instruction. You want something in
8 addition to that expert instruction.

9 **MR. SPIRO:** What we penned up I think is, you know
10 (As read):

11 "During the trial you will hear testimony
12 from witnesses who will testify to opinions
13 and the reasons for their opinion. These
14 witnesses do not have direct knowledge of the
15 facts at issue in this case. Therefore, this
16 evidence is not to be used to establish the
17 facts in this case."

18 And I can hand up a copy of that.

19 **THE COURT:** Hand up a copy. Hopefully you have given
20 a copy to Mr. Porritt and his team.

21 Let me get your response.

22 **MR. PORRITT:** This proposed additional expert
23 instruction we're seeing for the first time now so we are
24 reacting live. So, I don't think that's an accurate statement.
25 Of course expert opinion enables the jury to -- jury's only

1 determining facts, expert opinion is to assist them in
2 determining facts. It is not direct evidence, it is opinion
3 evidence. So I don't think that is an accurate statement of
4 the law. We've --

5 **THE COURT:** Well, it isn't an inaccurate statement of
6 the law that an expert may base his opinion on facts as he or
7 she understands them. But the reason why we're allowing the
8 recitation of those facts is so you understand the basis of
9 that expert's opinion. Those -- statement as to the facts,
10 itself, is not admissible evidence for, for the truth of the
11 matter asserted. But it is permissible to evaluate, to
12 understand the basis of the expert's opinion. I mean, that's
13 the law. Right? It's not evidence.

14 **MR. PORRITT:** I mean, I would say it's not direct
15 evidence of the facts. I just think -- we have a standard,
16 Your Honor's crafted the standard expert opinion jury
17 instruction. I don't see at this point -- it's not --
18 Mr. Spiro's suggesting this is the, you know, first time an
19 expert has testified early in a case. I mean, the last, the
20 *General Motors* class action trial Your Honor had before you in
21 October, the very first witness was an expert witness. So, so
22 it's not that unusual.

23 I don't see any need for this additional instruction on
24 experts. It's going to be covered by and could be adequately
25 addressed when we're presenting the case for the jury in

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1 closing arguments, they can explain who Professor Subramanian
2 is and how experts work. Your Honor will instruct. I don't
3 see any need to impose that right now. It is simply looking to
4 sort of undermine the expert testimony ahead of time.

5 **THE COURT:** Well, if I give it to one, I'm going to
6 give it to all. So I don't know if you -- whoever you have,
7 it's going to apply to both sides. It is not just a one-sided
8 thing.

9 **MR. SPIRO:** That sounds fair to the defense.

10 **MR. PORRITT:** The instruction is given now, and their
11 expert's not appearing for two weeks. So -- more than likely.

12 **THE COURT:** Well, before every expert I normally give
13 an expert instruction.

14 **MR. PORRITT:** Okay. So --

15 **THE COURT:** So let's talk about -- I want to resolve
16 this, and we're going to run out of time soon. So what's your
17 reaction to my supplemental instruction, as amended to use the
18 word "untrue statements" as opposed to "misrepresentations"?

19 **MR. PORRITT:** We don't have an issue with "untrue
20 statement" versus "misrepresentation," so that's not an issue.
21 We are equally appreciative of Your Honor working late and
22 crafting this instruction.

23 We are concerned not just about the falsity issue but on
24 scienter, we heard a lot of statements in Mr. Spiro's opening
25 about how if it was innocent, it was in good faith, no one

1 intended to commit fraud --

2 **THE COURT:** Let me just say right now, I'm not saying
3 I'm not going to give the finding of reckless disregard at the
4 end, now that they have withdrawn their, you know, their
5 proposal. So you will have room to argue that. I don't think
6 I need to do that now, because they're going to hear this
7 stuff. And my main goal is to avoid the confusion. As we
8 began to see during the voir dire a little bit, one juror was
9 kind of confused, and I got kind of confused, myself. And I
10 don't want this thing to unwind, especially with Mr. Musk
11 testifying, and probably others, and all the documents that are
12 coming in. They should have some framework to understand why
13 this is coming in.

14 **MR. PORRITT:** We asked for a clarifying instruction,
15 an additional instruction now, and Your Honor has crafted one.
16 So obviously, we support that.

17 We are concerned -- once again, I don't intend to ask --
18 it would be crazy of me to ask Mr. Musk, "This was untrue
19 wasn't it, Mr. Musk," and expect him to say --

20 **THE COURT:** Well, you could ask "Do you think." I
21 think the question is: Is it untrue? It's implied. But, I
22 mean, I didn't think you would ask that question. But if you
23 did, it's probably irrelevant since I made a finding.

24 **MR. PORRITT:** I completely agree, Your Honor.

25 **THE COURT:** Of what he thought is in play.

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1 **MR. PORRITT:** Well, yes and no, Your Honor. I mean, I
2 would -- I'm also concerned that Mr. Spiro is going to ask and
3 say: Well, you honestly believed that you were saying the
4 right thing. And all these sorts of -- these sorts of
5 concepts, which are frankly irrelevant to whether he knew or
6 didn't know. I don't think that goes to knowledge.

7 So that is the --

8 **THE COURT:** I don't know. The human mind, there's
9 many ways to ask, to discern what somebody knew and what they
10 thought is probative of what they knew. So I'll let you know
11 right now, I'm going to give fairly free rein on that question,
12 which is why I'm going to admit all the stuff that was objected
13 to -- all the transactional documents, even a year before, to
14 the extent that he was in meetings, et cetera, et cetera, with
15 PIF people, that that is relevant to his state of mind by the
16 time you get to August 7, 2018.

17 **MR. PORRITT:** Very good -- oh, I understand that
18 ruling. And so we're stating our concern. We obviously don't
19 object to this particular supplemental jury instruction. And
20 we're grateful for Your Honor crafting it. We are going to
21 raise this concern, and we'll perhaps have to see how the --
22 how the evidence comes in, and how it's presented by the
23 defense.

24 But we were concerned about the tone of some statements
25 there and the sweeping nature of the tone of some statements

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1 that Mr. Spiro made in his opening. And the risk of jury
2 confusion on the scienter issue we think is also apparent and
3 is a matter that we will -- you know, I think the Court -- we
4 would appreciate the Court keeping an eye on, as I'm sure it
5 will.

6 **MR. SPIRO:** Your Honor, related to this question that
7 I take it Mister -- the Court agrees with me on and Mr. Porritt
8 won't ask, which is: Is this true, the other concern I have or
9 other sort of -- I'm calling them "trapping questions." It's
10 not to cast aspersions necessarily at plaintiff. But, such as
11 SEC-related issues.

12 I mean, one thing that I want to make sure of which is
13 standard in all cases is that the depositions -- there's two of
14 them, and I just wanted to flag this for the Court since we
15 have a moment now -- that they be referred to just as
16 deposition and date, and then the later deposition and date.
17 Not SEC deposition versus this case deposition. That's
18 standard. I didn't think anything differently would be done,
19 but I wanted to flag it for the Court's attention.

20 **THE COURT:** What's the issue, again?

21 **MR. SPIRO:** Yeah, I just -- again, this is standard so
22 I don't -- I'm raising it in an extra abundance of caution.
23 But there's two depositions in this case for some of the
24 witnesses, including Mr. Musk. There's -- and they happen at
25 two different dates. And so when you refer to them, you refer

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1 to them as Deposition 1 or the date, and the deposition -- the
2 later deposition and the date. You don't say "the SEC
3 deposition," right, because what you're really then doing is --
4 well, one --

5 **THE COURT:** You don't need to use "SEC" to identify
6 the deposition.

7 **MR. SPIRO:** Correct. Correct. They're different
8 dates, of course. And so -- and the problem with any
9 questions -- and I hope that the Court keeps its antennae up --
10 is you're putting him again in a Hobson choice, because the
11 Court has ruled that certain things are not in this case. The
12 only thing that the Court ruled that could be in this case was
13 something that happened in the market, for the affect on the
14 market related to governments and regulators.

15 So those questions can't be asked to Mr. Musk, and you
16 can't refer to the deposition, which you never do, right? And
17 we deal with this all the time. If it's a criminal an civil
18 case, if there's a retrial, you always reference the
19 depositions by dates to sanitize it. So I just wanted to make
20 sure of that. And I assume that's not an issue, either.

21 The other -- the other -- I don't want to take the Court's
22 comment -- although I do see we have a few minutes -- as an
23 invitation to discuss the one major issue that we have to
24 discuss in terms of exhibits for Mr. Musk. And there's really
25 only one -- the parties have basically dealt with all issues

1 related to Mr. Musk's exhibit -- is the PIF notes.

2 In Mr. Porritt's opening statement not that I'm trying to,
3 you know, rehash things I didn't object to at the time which is
4 not really how this works, but he, he uses the notes and he
5 uses the PIF's text messages in essentially an improper way for
6 the truth of the matter asserted in violation of the rules
7 about hearsay. And that's improper.

8 And he sort of, probably by accident, suggested to the
9 Court when we were discussing the PIF's text messages that he
10 did intend to use it for improper purpose. I'm not sure if the
11 Court remembers that. And then he said it was an excited
12 utterance. In any event, I remember it.

13 The point is the PIF notes are not admissible in this
14 case, they can't be admissible because, as the Court knows, we
15 tried to get the PIF here; they didn't come. Plaintiff didn't
16 even try to get the PIF here.

17 **THE COURT:** Let me give you my view. I think they are
18 relevant. If there is a basis for authenticity, it gets in.

19 **MR. SPIRO:** Right.

20 **THE COURT:** And the key there is what's the evidence
21 of where it came from. Obviously, PIF is not here. They're --
22 not your standard custodial method of authenticating is not
23 available, but that's not the only way.

24 So if there was evidence of a chain of custody, that it
25 came from PIF to the SEC, to the plaintiffs, or to the

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1 defendants, if that can be established, and you look at the --
2 within the four corners of the document, itself, does it appear
3 to be authentic, is there any reason to doubt the seal on
4 there, et cetera, et cetera, do the dates line up with
5 actual -- some corroboration there was indeed a meeting, at
6 that juncture I would say it's admissible. But I need to hear
7 the foundation.

8 **MR. SPIRO:** There is none of that foundation. They
9 weren't even done contemporaneously, so that's my point. I
10 agree with the Court.

11 If there was a PIF witness here who said these are fair
12 and accurate, they're business records, et cetera, et cetera,
13 but there's none of that. Zero, none. So it can't come into
14 evidence in a United States courtroom.

15 **THE COURT:** Let me ask, what about the foundation of
16 authenticity?

17 **MR. PORRITT:** Okay. Sorry, Ms. Tripodi is prepared to
18 address that, Your Honor.

19 **THE COURT:** Okay.

20 **MS. TRIPODI:** Good morning, Your Honor.

21 **THE COURT:** Good morning.

22 **MS. TRIPODI:** Elizabeth Tripodi.

23 Your Honor, the PIF minutes were produced to us by the SEC
24 in the context of their investigation. So the PIF provided
25 them to the SEC. They provided them to us.

1 **THE COURT:** What evidence do you have of how the SEC
2 got it?

3 **MS. TRIPODI:** We do not have the chain of custody from
4 the PIF to the SEC, but that is something we could obtain.

5 The other things I want to the point out, Your Honor, with
6 respect to Mr. Spiro's comment that there were no
7 contemporaneous notes being taken, we have two -- we have two
8 witnesses on record at their deposition, both Mr. Teller and
9 Mr. Ahuja, noted that there was a PIF representative who was
10 taking notes on a laptop during the meeting.

11 **THE COURT:** All right, so there was -- you have
12 evidence to support the claim that these were contemporaneous
13 notes, satisfying one of the elements of 803(6).

14 **MS. TRIPODI:** Yes, Your Honor.

15 **THE COURT:** And you say, you're proffering but you
16 don't have before the Court, evidence to show the sufficient
17 chain of custody that suggests -- that would establish the
18 authenticity of this document. But you could produce that.

19 **MS. TRIPODI:** We could. We do have a transmittal
20 letter, Your Honor, from the SEC.

21 **THE COURT:** Does it explain how the SEC got it?

22 **MS. TRIPODI:** I believe we do...

23 (Off-the-Record discussion)

24 **MS. TRIPODI:** And from Akin Gump, who was the PIF's
25 counsel in conjunction with the SEC investigation.

1 **THE COURT:** This is what we're going to do. During
2 the break, the next break -- this is not going to come up
3 before the break, right?

4 **MS. TRIPODI:** I don't believe so, Your Honor.

5 **MR. SPIRO:** No, Your Honor. But I do want to get us,
6 like, back into the rules of evidence a little bit. There's
7 nobody who knows who took the notes. There's no evidence about
8 what the person they saw with the computer has anything to do
9 with this. Meaning this is just some document.

10 This is -- it's not as if the witnesses are going to say:
11 Oh, yeah, that looks like -- I could tell by the way he was
12 hitting his computer it would have generated something that
13 looks like this.

14 These notes, the minutes of -- the minuted (indicating
15 quotation marks) are done after the fact. So even if they were
16 here, frankly, they wouldn't come into evidence.

17 **THE COURT:** What's the exhibit number?

18 **MS. TRIPODI:** It's Exhibit No. 80, Your Honor.

19 **THE COURT:** 80?

20 **MR. SPIRO:** There's no evidence that they were kept in
21 the ordinary course of business, that it was the ordinary
22 course of business to keep these notes, that it was done
23 contemporaneously. Not a single -- forget about -- there's not
24 a speck of evidence that they are authentic or that there is
25 any foundation for them at all. Zero.

1 **THE COURT:** All right. So what about the other
2 elements of 803(6)?

3 **MS. TRIPODI:** Your Honor, there was a seal on the
4 document. The document was dated --

5 **THE COURT:** That goes to authenticity. But you have
6 other elements of 803(6), that these are documents produced by
7 somebody with personal knowledge of whatever was stated in
8 here, that they're contemporaneous and that it's done in the
9 normal, regular course of business.

10 **MS. TRIPODI:** Understood --

11 **THE COURT:** Normally you have somebody who says that.

12 **MS. TRIPODI:** I understand that, Your Honor.
13 Your Honor, as I explained to you, the chain of custody that we
14 have from these minutes was that they were produced to Akin
15 Gump by the PIF --

16 **THE COURT:** That goes to authenticity, and you may
17 well be able to -- let's assume for a moment this is
18 authentic -- I find that there is enough here to say: Yeah,
19 this is a PIF document.

20 **MS. TRIPODI:** Yes, Your Honor.

21 **THE COURT:** You're over that hurdle. You've got
22 several other elements of 803(6). How do you satisfy that
23 these were taken by somebody at the time with contemporaneous
24 knowledge?

25 **MS. TRIPODI:** Your Honor, all we have on that element

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1 is that there were two witnesses from Tesla who observed
2 someone from the PIF at the July 31st meeting, taking notes on
3 a laptop.

4 **MR. SPIRO:** He could have been doodling, or writing
5 about sports he was seeing over here. They have no idea.

6 And -- but, I know we're skipping authenticity for the
7 sake of the fact that they obviously can't show foundation.
8 But, just going back to authenticity for a second. Somebody in
9 The Kingdom of Saudi Arabia sent a two-page Word typed document
10 to a lawyer at Akin Gump. There's a -- there's not a raised
11 seal on this. Even if there were, I'm sure the Court is not
12 taking this Saudi Arabian symbol that they're referring to on
13 this document as some sort of indicia of anything. They send
14 this to a lawyer at Akin Gump. He's talking to the SEC. He
15 doesn't want the PIF having to talk to the SEC. So he sends
16 them the two pages of notes.

17 The SEC has no idea, literally no idea whether these are
18 real, whether they're contemporaneous. They don't use them for
19 any reason or purpose. And then when all of their files are
20 turned over they now have these notes, that, again --

21 **THE COURT:** All right.

22 **MR. SPIRO:** Yeah.

23 **THE COURT:** At this juncture, based on what I've seen,
24 authenticity has not been established, at least based on what I
25 have before me now. There are elements of 803(6) for which

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1 there's no real evidence. The best you can do is inference,
2 somebody in the room saw somebody typing. But we don't know
3 whether that person was the one actually typing this, or
4 whether this was done days later. What purpose it was done
5 for.

6 That's not to say that this can't be used to refresh
7 recollection or other ways, perhaps, but not as affirmative
8 evidence, unless you satisfy 801(3). So at this point my view
9 is that this doesn't meet admissibility standards. And if you
10 can figure out a way to do that between now and then, I'll
11 entertain it at that point.

12 **MS. TRIPODI:** Your Honor, could I ask you to consider
13 one other option, which is the residual hearsay exception under
14 807?

15 The minutes, while they don't have the raised seal that
16 Mr. Spiro is insisting on, they do have somewhat of a
17 sufficient guarantee of trustworthiness in that we can
18 establish this chain.

19 And we have a situation here, Your Honor, where there are
20 going to be numerous witnesses from the defense side who are
21 going to be telling their story, what happened at this
22 July 31st meeting. And I think, as Your Honor can recognize,
23 looking at those minute -- those meeting minute notes in
24 Exhibit 80, there's a different story that's being told in
25 those.

1 There is no reason to believe that the PIF had a
2 motivation that was adverse to Tesla when they were providing
3 those meeting minutes.

4 **MR. SPIRO:** Well, actually, I disagree.

5 **THE COURT:** All right. It's 8:30.

6 **MR. SPIRO:** Okay.

7 **THE COURT:** And we're going to take this up, and the
8 clock is going to run. You've used your free 15 minutes. Let
9 me just --

10 **MS. TRIPODI:** Thank you, Your Honor.

11 **THE COURT:** Let me just say that with respect if we
12 get to Mr. Subramanian, I do have an issue with some of the
13 slides. Slide No. 2 that has references to what -- nice things
14 that people have said about him, that's hearsay. That's not
15 coming in.

16 **MR. APTON:** His qualifications, Your Honor?

17 **THE COURT:** His qualifications, you know, if he's
18 earned an award, got a Nobel Prize, yeah, that comes in. But
19 to say: So and so says he's great, he's one of the best...
20 that's hearsay.

21 **MR. APTON:** I assume you're referring to the Vice
22 Chancellors and Chancellors of the Delaware court, Your Honor?

23 **THE COURT:** Well, Slide 2. Yeah the vice Chancellor,
24 the Chancellor, so...

25 **MR. APTON:** Okay.

1 **THE COURT:** Yeah. That's out.

2 **MR. APTON:** But the other points of his qualifications
3 on that slide are okay, Your Honor.

4 **THE COURT:** Well, because he's going to testify that:
5 I've given so many depositions, and if it's just a summary of
6 that, that's okay.

7 And then Slide 11.

8 **MR. APTON:** Oh.

9 **THE COURT:** He starts getting into Musk's reason and
10 any -- opining about his motivation, subjective. His testimony
11 is coming in for objective purposes. What was done, how it
12 deviated, et cetera, et cetera, from the norm.

13 **MR. APTON:** Your Honor, if I may, I exchanged with
14 counsel a revised slide deck. So our page numbers are a little
15 bit off right now.

16 **THE COURT:** This is the one that says "Tweets, no
17 defense, no explanation, no rationale."

18 **MR. APTON:** Yeah, I think that's Slide 11. I don't
19 think we're using that slide.

20 **THE COURT:** Okay, then that obviates my issue. Those
21 are the two. I overrule any objections with respect to the
22 others. At least from what I can see, stuff may come up during
23 testimony, but --

24 **MR. APTON:** So Your Honor, we'll revise Slide 2 and
25 then go forward with that.

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1 **THE COURT:** Yeah. And also I'm assuming my general
2 rule that you are not going to use -- show evidence that has
3 not already been admitted. If something's already been
4 admitted, you can show that during his testimony.

5 But if something's not been admitted because of my concern
6 about him serving as kind of a summary witness at the outset of
7 the case, --

8 **MR. APTON:** Sure.

9 **THE COURT:** -- my ruling stands.

10 **MR. APTON:** Your Honor, with respect to Exhibit 81
11 which was shown to the jury during openings, I intend to admit
12 that. That is the Musk proposal to the board to take it
13 private.

14 **THE COURT:** That was already shown?

15 **MR. APTON:** Yes, Your Honor. During openings.

16 **THE COURT:** All right. If it was already shown, then,
17 then --

18 **MR. PRICE:** We have no objection to that, Your Honor.

19 **MR. APTON:** There's a few other documents. The 8-K
20 that was filed with the SEC, I think that would be subject to
21 judicial notice. I don't know if counsel --

22 **MR. PRICE:** I have no objection to that either,
23 Your Honor.

24 **THE COURT:** Okay.

25 **MR. APTON:** That was Exhibit 101. And there was a --

1 his resume, which is 360.

2 **THE COURT:** And the resume can come in if he
3 incorporates by reference, to shorthand. Rather than having
4 him recite all 20 pages or whatever it is, this is like a
5 summary document.

6 **MR. APTON:** Yes, Your Honor.

7 **THE COURT:** So without that, it's hearsay. But if he
8 adopts it and incorporates it by reference, then I'm going to
9 allow it.

10 **MR. APTON:** No, Your Honor, my intent is to give a
11 general overview of his background qualifications, and then
12 move to admit the resume.

13 **THE COURT:** Okay.

14 **MR. APTON:** Let's see. 8, 12, and 13 are already in
15 evidence. Those are -- I'm referring to exhibits. And I think
16 that's the long and the short of it. But Your Honor, with that
17 said, I don't know that we need the expert jury instruction,
18 because we are not giving a factual summary. And the point of
19 this jury instruction is to take the wind out of the sails of
20 Professor Subramanian right before he testifies.

21 **THE COURT:** Whatever I give is going to be given with
22 respect to all, I'm going to give equal treatment. So he's
23 going to opine about certain things that -- that is within his
24 purview. This is what experts can rely on, so under 703, he
25 can do that.

1 But I want to make clear to the jury that that doesn't
2 make it evidence, admitted evidence. It is admitted for the
3 basis of their understanding the base of his testimony and
4 evaluating his testimony.

5 **MR. APTON:** Sure. Your Honor, defendant's proposed
6 jury instruction, though, does suggest that what he's saying
7 are not the facts --

8 **THE COURT:** I'm not going to read it -- I'm going to
9 give my version of that.

10 **MR. APTON:** Thank you.

11 **THE COURT:** It'll have something like that.

12 **MR. PRICE:** Your Honor, one other thing on the new
13 slides that we got, on -- I don't know the number; I don't
14 think you have this one. But one of his opinions is going to
15 be: Mr. Musk's tweets suggest that he wanted to make a first
16 and final offer, skip over the special committee approval
17 process, and proceed directly to a shareholder vote, all in 30
18 days.

19 He's making findings of fact as to the intent of those
20 tweets. For example, the tweet that the only obstacle -- I'm
21 paraphrasing, you know -- of this happening is a shareholder
22 vote. So he's making the conclusion for the intent.

23 **THE COURT:** Mr. Musk's intent with respect to the
24 process is permissible. Because we're going to talk about the
25 process. Why he did it, because he did it because he wanted

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1 to, you know, X, or gain, whatever advantage or -- that's the
2 stuff that's not pertinent. So I'm going to allow, you know,
3 testimony about what the intent was, with respect to the
4 process. The actual steps. Not the whys.

5 **MR. PRICE:** And I understand. I think it's beyond his
6 expertise to testify as to Mr. Musk's intent. He can say what
7 the documents say. But after that, he's just trying to --

8 **THE COURT:** Well, but it's an inference based on the
9 sequence of things. You can object during the testimony, and
10 I'll hear it at that point.

11 **MR. PRICE:** Sure.

12 **THE COURT:** I need to hear it. But my inclination at
13 this point is not to do so.

14 **MR. PRICE:** Okay, very well.

15 **THE COURT:** Okay?

16 **MR. APTON:** Thank you, Your Honor.

17 **MR. SPIRO:** And finally, Your Honor, just to confirm,
18 you're giving a burden of proof --

19 **THE COURT:** Okay. So what I'm going to do on the
20 burden of proof, I'm going to add the words after I say: You
21 will hear testimony regarding circumstances and communications
22 relating to the two tweets on August -- blah, blah, blah, blah,
23 blah, and then I will say, "The plaintiff -- as I have stated,
24 the plaintiff has the burden of proving the elements of a 10b-5
25 claim. However, you are to assume that the statements "Funding

1 secured," blah, blah, blah, blah, blah, were untrue.

2 So I'm going to slip it in there before I give the --
3 remind them of the untrue thing, because that's the context of
4 it. Because they have the burden, but that is one area where
5 they don't have the burden, because they don't have to -- the
6 jury need not concern itself with that issue.

7 And then I'm going to continue to read: Therefore this
8 evidence is not used to determine whether the statements are
9 untrue. Rather it's relevant -- it may be relevant to such
10 issues as...

11 And I will use the word "untrue statements" instead of
12 "misrepresentation."

13 **MR. SPIRO:** Yeah. It hit my ear wrong because the
14 "burden of proof" is in the same sentence as "the statements
15 that you're assuming" so it kind of seems to have internal
16 tension.

17 Our preference would be just a standalone, that: The
18 plaintiff has the burden to prove the elements of a 10b-5
19 claim.

20 **THE COURT:** I only added "as I have stated" because I
21 already stated the burden that I think the plaintiff has the
22 burden of proving. I mean, I can make it a separate sentence,
23 but there is a relationship. I think the word is "however."

24 **MR. SPIRO:** Yeah, to us, because again, it almost
25 contradicts what you're saying, with the "assuming these things

1 are untrue." It fits better where you are talking about what
2 they still need to prove.

3 So at the end, that differed in a material way, which the
4 plaintiff has the burden to prove. Right? Or where it says
5 "would be relevant to other issues and elements which the
6 plaintiff has the burden to prove." But not have it exactly
7 where you say this is something that is to be assumed, because
8 there's internal tension there.

9 And we have nothing further. Thank you, Your Honor.

10 **MR. PORRITT:** Your Honor, we haven't even seen this
11 instruction, so -- it's never been shared with us at this
12 point.

13 **THE COURT:** This is the instruction I gave you this
14 morning.

15 **MR. PORRITT:** Okay. Sorry.

16 **THE COURT:** And he want to add words reminding the
17 jury that the plaintiff has the burden of proving the elements.

18 **MR. PORRITT:** Understood. And I was trying to follow
19 what Mr. Spiro was saying, and I couldn't really --

20 **THE COURT:** Well, I think what he wants to say is
21 towards the end: Rather, such elements may be relevant to
22 other issues on which the plaintiff has the burden of proof,
23 such as knowing, materiality...

24 **MR. PORRITT:** Okay. I mean --

25 **THE COURT:** So those are simple words. I'll add

1 the...

2 All right. So the jury is waiting, right, Vicky?

3 **THE COURTROOM DEPUTY:** Yes.

4 **THE COURT:** Let's bring them in. We're already now
5 ten minutes late. Make a note of that. I'll let you know who
6 gets assessed.

7 (Recess taken from 8:41 a.m. to 8:45 a.m.)

8 **THE COURT:** All right. Have a seat everyone.

9 Good morning, ladies and gentlemen, members of the jury.
10 Thank you for your patience. We're getting better. Instead of
11 40 minutes late, we're about 13 minutes late today. So
12 we're -- we're getting there.

13 So I want to get started. Before I do, I do want to give
14 you a supplemental instruction to help you as we proceed and
15 hear additional evidence.

16 You will hear testimony regarding the circumstances and
17 communications relating to the two tweets by Elon Musk on
18 August 7th, 2018 and Mr. Musk's state of mind as to those
19 tweets.

20 As I've stated, you are to assume that the statements,
21 quote, "funding secured," close end, and quote, "Investor
22 support is confirmed. Only reason why this is not certain is
23 that it's contingent on a shareholder vote," close quote, were
24 untrue. Therefore, the evidence is not to be used to determine
25 whether the statements were untrue.

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1 Rather, such evidence may be relevant to other issues on
2 which the plaintiff has the burden of proof, such as whether
3 Mr. Musk knew the statements were untrue when he made them
4 and/or whether the untrue statements gave a reasonable investor
5 the impression of a state of affairs that differed in a
6 material way from the one that actually existed.

7 So, hopefully, that will give you a framework when you
8 listen to the testimony.

9 With that, I believe the plaintiff is prepared to call the
10 next witness.

11 **MS. TRIPODI:** Good morning, Your Honor.

12 **THE COURT:** Good morning.

13 **MS. TRIPODI:** Plaintiff is calling Timothy Fries to
14 the stand.

15 **THE COURT:** All right.

16 **MS. TRIPODI:** Your Honor, I have a witness binder for
17 the Court.

18 **THE COURT:** Thank you.

19 (Whereupon exhibit binder tendered to the Court.)

20 **THE CLERK:** Can you remain standing, please. Please
21 raise your right hand.

22 **TIMOTHY FRIES,**
23 called as a witness for the Plaintiff, having been duly sworn,
24 testified as follows:

25 **THE WITNESS:** I do.

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1 **THE CLERK:** Thank you. Please be seated. You can
2 take off your mask to speak.

3 Please speak clearly into the microphone. State your
4 first and last name for the record and, also, spell it.

5 **THE WITNESS:** My name is Timothy Fries.
6 T-I-M-O-T-H-Y, F-R-I-E-S.

7 **THE COURT:** All right. Thank you, Mr. Fries.
8 You may start your examination.

9 **DIRECT EXAMINATION**

10 **BY MS. TRIPODI**

11 **Q.** Good morning, Mr. Fries. And good morning, jurors.

12 My name is Elizabeth Tripodi, and I'm one of the attorneys
13 representing plaintiff Glen Littleton and in class.

14 Mr. Fries, can you please tell the jurors where you live
15 currently?

16 **A.** I live in Flemington, New Jersey, or I have since 1995.

17 **Q.** And are you married?

18 **A.** Yes. I have been married since 1996.

19 **Q.** Do you and your wife have children?

20 **A.** Yes. We have three children.

21 **Q.** How old are your children?

22 **A.** I have a daughter who is 22, and I have twin boys who are
23 20.

24 **Q.** Are your children in school at present?

25 **A.** Yes, they are in school. I have -- my daughter goes to

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1 Ramapo State College in New Jersey. I have a son at Fordham
2 University in New York, and my other son goes to George
3 Washington University in Washington D.C.

4 **Q.** Will you tell the jurors about your educational
5 background, please?

6 **A.** Yes. After high school, I went on to Glassboro State
7 College, now called Rowan University. There I obtained a
8 four-year degree in computer science. That was in 1992.

9 **Q.** Are you currently employed, Mr. Fries?

10 **A.** Yes, I am, with Alight Solutions.

11 **Q.** And what does Alight Solutions do?

12 **A.** Alight Solutions does information services, specializing
13 in HR, benefits administration and professional consulting.

14 **Q.** What is your position with Alight Solutions?

15 **A.** My position is a senior delivery manager.

16 **Q.** And so what do you do as a senior delivery manager?

17 **A.** In that role I manage a team of software developers and
18 software testers.

19 **Q.** How long have you held your position with Alight
20 Solutions?

21 **A.** I started with Alight Solutions in 1995. Back then it was
22 called Hewitt Associates. I started in an internal systems
23 support role. I did that for a couple years and then moved on
24 to various positions developing solutions for our clients. So
25 I had roles in project management, software development and

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1 consulting. And then for the past eight to nine years I have
2 been managing a team of developers.

3 **Q.** Approximately how many developers do you manage?

4 **A.** I manage a team of ten.

5 **Q.** Does your wife work?

6 **A.** Yes. My wife works as a nurse at an assisted living
7 facility.

8 **Q.** Mr. Fries, what is your role in this lawsuit?

9 **A.** My role in this lawsuit is a witness. I'm also a member
10 of the class. I'm here on behalf of other shareholders that
11 lost money as a result of the tweet.

12 **Q.** Did you invest in Tesla stock?

13 **A.** I did.

14 **Q.** When was your first investment in Tesla stock?

15 **A.** It was August 8th of 2018.

16 **Q.** And what was the size of that investment in August of
17 2018?

18 **A.** I purchased 50 shares of stock. It was \$18,000.

19 **MS. TRIPODI:** Your Honor, I would like to show the
20 witness Exhibit 525.

21 **MR. SPIRO:** No objection.

22 **THE COURT:** All right. You may.

23 (Document displayed.)

24 **BY MS. TRIPODI**

25 **Q.** Mr. Fries, on the screen in front of you do you see what's

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1 been marked as Exhibit 525?

2 **A.** I do, yes.

3 **Q.** Do you recognize that exhibit?

4 **A.** Yes. That's my Fidelity statement from August of 2018.

5 **MS. TRIPODI:** Your Honor, I would like to move to
6 admit Exhibit 525 into evidence please.

7 **THE COURT:** No objection?

8 **MR. SPIRO:** Yes. No objection.

9 **THE COURT:** All right admit.

10 (Trial Exhibit 525 received in evidence)

11 **BY MS. TRIPODI**

12 **Q.** Mr. Fries, if we can look at Page 5 of your account
13 statement.

14 (Document displayed.)

15 **A.** I see it.

16 **Q.** Does that accurately reflect your investment in Tesla
17 stock in August of 2018?

18 **A.** Yes. I see 50 shares with a cost basis of around \$18,000.

19 **Q.** And does the statement indicate that the per share price
20 you paid for Tesla stock was \$370?

21 **A.** Yes. I see that.

22 **Q.** Now, Exhibit 525 provides a settlement date of
23 August 10th. Do you see that?

24 **A.** I see that.

25 **Q.** Do you have an understanding of what the settlement date

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1 is?

2 **A.** Yes. The settlement date is when the shares actually
3 change hands.

4 **Q.** So would the settlement date be after you actually
5 purchased the shares?

6 **A.** Yes. The settlement date follows the purchase date.

7 **Q.** And do you recall when you purchased these shares of Tesla
8 stock?

9 **A.** Yes. I purchased those shares on August 8th of 2018.

10 **Q.** Aside from this investment in Tesla, in 2018 did you have
11 other investments?

12 **A.** I may have had one or two other individual stocks at the
13 time. The majority of my investments were, though, in my
14 401(k), where I held some mutual funds.

15 **Q.** Can you describe for the jury what a 401(k) account is?

16 **A.** Yes. A 401(k) account is an employer-sponsored retirement
17 plan where a percentage of my paycheck goes in there so it
18 grows for my retirement years.

19 **Q.** Did you actively manage your 401(k) plan in August of
20 2018?

21 **A.** Yes, I did.

22 **Q.** And how did you actively manage that?

23 **A.** I would log in and choose those funds within that plan.
24 So it was maybe 10 to 12 funds I could choose among.

25 **Q.** How would you choose the funds in your 401(k) plan?

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1 **A.** It was sort of a balanced portfolio, so with some mutual
2 funds in stocks and others in bonds.

3 **Q.** How would you characterize the risk profile of your 401(k)
4 in August of 2018?

5 **A.** I would say not risky. The idea of my 401(k) is to grow
6 wealth over time.

7 **Q.** And aside from your investment in Tesla stock, do you
8 recall whether you held any other stock investments in August
9 of 2018?

10 **A.** I don't recall exactly. There may have been one or two
11 other investments.

12 **Q.** With respect to stocks you invest in, generally what are
13 your investment goals?

14 **A.** Just purchasing individual stocks. You know, make some
15 money, right, not lose money.

16 **Q.** How do you prevent yourself from losing money with stocks
17 you invest?

18 **A.** I chose companies I felt were promising based on
19 information I had at the time.

20 **Q.** What led you to invest in Tesla in 2018?

21 **A.** What led me to invest in it? Well, I was looking at them
22 for some time, looking for a good entry point to get in on the
23 stock.

24 In 2018 I recall a news story on CNBC about Elon's tweet
25 about "taking Tesla private." The tweet was specific with a

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1 share price of 420, \$420 a share. And it also mentioned that
2 funding was secure.

3 **Q.** If we could back up for a minute. You said you had been
4 looking at Tesla stock and a good entry point for Tesla stock;
5 is that correct?

6 **A.** That's correct.

7 **Q.** And what do you mean by "a good entry point"?

8 **A.** By "a good entry point," I mean relatively low stock
9 price.

10 **Q.** And prior to August of 2018, had you been looking for a
11 good entry point into Tesla?

12 **A.** Yes. I had been looking for a good entry point in Tesla
13 for some time.

14 **Q.** And as you just testified, was it the tweet that you saw
15 that led you to invest in Tesla in August of 2018?

16 **MR. SPIRO:** Objection. Leading.

17 **THE COURT:** Sustained. Rephrase, please.

18 **BY MS. TRIPODI**

19 **Q.** What led you to buy stock in Tesla on August 8th of 2018?

20 **A.** It was the tweet.

21 **Q.** Did you see Mr. Musk's tweet?

22 **A.** Yes. The tweet was displayed and quoted on the CNBC
23 program.

24 **Q.** And what was your reaction to the news of this tweet?

25 **A.** My reaction to the tweet was, you know, wow. You know,

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1 here we have Elon Musk telling the world that he plans to take
2 Tesla private at \$420 a share with funding secured. So
3 considering the stock price at the time, that felt like a good
4 entry point.

5 **Q.** What did "funding secured" mean to you at that time?

6 **A.** "Funding secured" to me meant that there had been some --
7 some vetting, some critical review of those funding sources.

8 **Q.** When you say "vetting," what do you mean?

9 **A.** I mean, a careful review of those funding sources.

10 **Q.** Was the representation "funding secured" in that tweet
11 important to you at that time?

12 **A.** Yes. The phrase "funding secured" was critical. Funding
13 secured gave me the confidence that I could get in and -- at
14 that 420 price.

15 So to me, "funding secured" along with "420," I felt that
16 there could be negotiations happening at that 420 price. So I
17 looked at 420 as the baseline for further negotiations,
18 thinking that it could perhaps go higher than that.

19 **Q.** And do you recall how soon after hearing the news of the
20 tweet that you purchased your shares?

21 **A.** I purchased my shares that same day.

22 **Q.** Did there come a time when you learned that "funding
23 secured," that portion of the tweet may have been false or
24 misleading?

25 **A.** Yes. In the days and weeks that followed, I learned

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1 through additional reporting on CNBC that funding was not
2 secured and that Tesla would remain a public company.

3 **Q.** Did Tesla ever become a private company, to your
4 knowledge?

5 **A.** They never did.

6 **Q.** Mr. Fries, why did you get involved in this lawsuit?

7 **A.** I got involved in this lawsuit because I felt wronged. I
8 felt that I lost money due to a misrepresentation.

9 **Q.** And what do you hope to obtain through this lawsuit?

10 **A.** I hope to have my -- my funds recovered, my losses
11 recovered.

12 **Q.** Did you lose money as a result of Mr. Musk's tweet?

13 **A.** I did. I lost \$5,000.

14 **Q.** Did you receive any sort of special payment or bonus for
15 participating in this lawsuit?

16 **A.** No. There is no special payment or bonus for
17 participating. I do expect to be reimbursed for my travel
18 expenses.

19 **Q.** Mr. Fries, it has been said that one wouldn't bet against
20 Elon Musk. Prior to purchasing your Tesla stock in August of
21 2018, would you have agreed with that statement?

22 **A.** Yes.

23 **Q.** Did you believe that Mr. Musk was going to take Tesla
24 private at \$420 per share?

25 **A.** Yes.

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1 **Q.** And why did you believe that?

2 **A.** Because the funding was secured.

3 **Q.** What happened because you believed Mr. Musk when he said
4 that funding was secured?

5 **A.** I lost money.

6 **MS. TRIPODI:** Your Honor, I have no further questions
7 for the witness. I reserve to redirect.

8 **THE COURT:** All right. Thank you.

9 Cross?

10 **CROSS-EXAMINATION**

11 **BY MR. SPIRO**

12 **Q.** Good morning, Mr. Fries.

13 **A.** Good morning.

14 **MR. SPIRO:** Can we put up the "Am considering" tweet?
15 Exhibit 8, please.

16 Okay. Can we just enlarge the top portion of that?

17 (Document displayed.)

18 **MR. SPIRO:** I'm going to pass up a binder to you also.
19 I don't know if we need this, but there it is.

20 **THE WITNESS:** Thank you.

21 (Whereupon exhibit binder was tendered to the witness.)

22 **BY MR. SPIRO**

23 **Q.** And, Mr. Fries, you can see that on your screen?

24 **A.** I can, yes.

25 **Q.** Okay. And I just want to talk about what was significant

1 about that tweet.

2 The first sentence, the main sentence in that tweet, "Am
3 considering taking Tesla private at \$420," that first sentence
4 was important to you; true?

5 A. Yes.

6 Q. And it was significant to you; true?

7 A. Yes.

8 Q. Okay. And the reason for that, at least in part, is
9 because the transaction that Mr. Musk was considering at the
10 time would be a major milestone for the company. If the
11 consideration came to pass, it would no longer be a public
12 company. It would be a private company; right?

13 A. Correct.

14 Q. And you had been watching the company for some time;
15 right?

16 A. Yes, I did.

17 Q. Since 2017, the year before; right?

18 A. Yes. At least that long.

19 Q. And, in fact, in 2017 when you saw the stock price, which
20 was actually lower than it was in 2018, you thought that
21 Tesla's stock price was insane, the valuation was insane; true?

22 A. Early on, when I was following them in 2017, they were
23 more of a fledgling startup, and the valuation at that time I
24 thought was getting a bit over -- over its skis.

25 Q. Yes, over its skis. And you used the word "insane;"

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1 right?

2 A. I did, in an email.

3 Q. And you said there was a "bubble going on," right?

4 A. At the time in 2017.

5 Q. Right, right. The stock price at the time wasn't an
6 accurate reflection of the company's market value to you;
7 right?

8 A. That's correct.

9 Q. And, you know, you're following Tesla. You're looking at
10 the stock price; right?

11 A. Yes.

12 Q. And you're doing some research as you're following Tesla
13 from 2017 into 2018; right?

14 A. Yes.

15 Q. And you're reading articles about it from 2017 into 2018;
16 right?

17 A. That's correct.

18 Q. And before Mr. Musk's "Am considering" tweet, you thought
19 Tesla was a worthy investment?

20 A. Could -- can you ask that again?

21 Q. Sure. Before Mr. Musk's "Am considering" tweet, you, sir,
22 thought that the Tesla was a worthy investment. That's why you
23 were following it.

24 A. Was it worthy? Well, I wasn't ready to purchase shares
25 until I saw the tweet.

FRIES - CROSS / SPIRO

1 **Q.** Well, we're going to talk about that, but -- but, I mean,
2 you've testified previously in this case; right?

3 **A.** In a deposition.

4 **Q.** Okay. And so I'm just going to ask again: Did you --
5 before Mr. Musk's tweet, before August 7th, did you believe
6 Tesla to be a worthy investment and one worth following and
7 considering purchasing?

8 **A.** Yes. I was considering purchasing; correct.

9 **Q.** Okay. And there were lots of reasons that you were
10 considering investing in Tesla; right?

11 **A.** Yes.

12 **Q.** You found the company interesting; right?

13 **A.** Yes. I thought they made innovative technology.

14 **Q.** That's another reason. You thought the company was
15 innovative?

16 **A.** That's correct.

17 **Q.** You thought they made innovative products?

18 **A.** That's correct.

19 **MR. SPIRO:** I don't know. Does this easel easily work
20 in this courtroom or should I use the Elmo more easily?

21 **THE COURT:** Well, are you going to draw something?

22 **MR. SPIRO:** I'm going to write something in not very
23 good penmanship, if that's okay with the Court.

24 Let me use the easel. That looks like it would be
25 difficult to --

FRIES - CROSS / SPIRO

1 **THE COURT:** Yeah. You can use it. Just tilt it in a
2 way so that the jurors can see it, and you'll have to write big
3 enough so all the jurors at the end can see it.

4 **MS. TRIPODI:** Your Honor, I'm going to object.
5 Mr. Spiro is going to create an exhibit, it appears.

6 **THE COURT:** I'm going to overrule that until I see
7 what it is. If you have an objection during the process.

8 So you'll have to move it so I can see it, too.

9 **MR. SPIRO:** Jesse is going to come help me.

10 (Brief pause.)

11 **BY MR. SPIRO**

12 **Q.** We talked about interesting. We talked about worthy. We
13 talked innovative, innovative products.

14 If your handwriting is better than mine, we can switch
15 roles.

16 **A.** You don't want to see my handwriting.

17 **Q.** And you had actually read reviews of the products; right?

18 **A.** I had.

19 **Q.** You were looking at reviews?

20 **A.** Uh-huh.

21 **Q.** You looked at -- you zeroed in on the specifications and
22 the progress of Model 3; true?

23 **A.** I did, yeah.

24 **Q.** And, in fact, you went out in July of 2018 and made a
25 purchase for a Model 3; right?

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1 **A.** I did.

2 **Q.** In the weeks leading up to the tweet?

3 **A.** I did.

4 **Q.** Okay. And that's a -- it was a good car?

5 **A.** I liked the car.

6 **Q.** Okay. You didn't -- I mean, you haven't had, like, a
7 fight with customer service at Tesla that led you to join this
8 lawsuit, anything like that?

9 **A.** I have not.

10 **Q.** Okay. Okay, good. So Model 3 purchase.

11 And obviously, you know, liking the product in a company
12 that makes good products is likely to have good sales; right?

13 **A.** That's correct.

14 **Q.** You thought that Tesla had good growth potential?

15 **A.** Yes.

16 **Q.** Growth potential.

17 **A.** Need help with that?

18 **Q.** No. Jesse is going to come help me. This is like
19 floating in the air.

20 **THE COURT:** It's a federal product.

21 (Laughter.)

22 **MS. TRIPODI:** Your Honor, may I please renew my
23 objection to relevance.

24 **THE COURT:** All right. Well, at this point are we
25 going to just continue just making notes of all his testimony?

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1 **MR. SPIRO:** I'm almost done.

2 **THE COURT:** All right. I'll allow a little bit more,
3 but...

4 **MR. SPIRO:** Okay. Jesse is going to hold it.

5 **THE COURT:** All right. That's a good idea.

6 **MR. SPIRO:** Quite an effort.

7 **BY MR. SPIRO**

8 **Q.** And you had experience in investing in technology-focused
9 companies; right?

10 **A.** I had invested in other technology-focused companies;
11 correct.

12 **Q.** And you, yourself, viewed yourself as somebody that had
13 better than average sense of technology trends; right?

14 **A.** Maybe slightly better.

15 **Q.** So tech experience. Expertise.

16 And those are just -- I'm just doing ten, just to keep
17 track of them for myself and for the jury.

18 You mentioned on -- stay there, Jesse, please -- the
19 direct examination that you were looking for a good entry
20 point? Is that --

21 **A.** That's correct, a good entry point.

22 **Q.** And you didn't have, like, a precise process to determine
23 a good entry point; true?

24 **A.** I'd say that's true.

25 **Q.** And, in fact, as we talked about before, the price of

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1 Tesla was less in 2017, when you decided to not purchase it,
2 than it was in 2018 before the tweets; true?

3 A. Yes. Circumstances had changed.

4 Q. Okay. And these things, obviously, that we're talking
5 about that predated the tweet, when you saw the tweet "Am
6 considering taking Tesla private," you saw it, you said, on TV?

7 A. Yes, on CNBC.

8 Q. And you purchased the next day; right?

9 A. The same day, I believe. Same day.

10 Q. Well, I mean, do you remember at first when you were asked
11 on direct, you said August 8th? I think you purchased on
12 August --

13 A. Okay. If the tweet was August 7th, then it must have been
14 the next day.

15 Q. All right. I just wanted to make sure we got that right.

16 And also, by the way, you saw that there was a -- the news
17 about Saudi Arabia being an investor; right?

18 A. Ask that again.

19 Q. Yeah. You saw the news about a group from --
20 quote/unquote, a group from Saudi Arabia being an investor?

21 A. I had heard that there was a possible group. That was
22 something I had heard. I didn't know how much faith I put into
23 that, that reporting.

24 Q. You learned to discount things you read in the news?

25 A. What's that?

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1 **Q.** Have you learned to discount things you read in the news?

2 **A.** I just don't know how much credit I gave that, that Saudi
3 Arabia group was purchasing. This tweet didn't mention Saudi
4 Arabia.

5 **Q.** It didn't mention Saudi Arabia, that's true, but you knew
6 about it. I mean, you gave it some weight; right?

7 **MS. TRIPODI:** Objection, Your Honor.

8 **THE COURT:** Sustained. He didn't say that.

9 **MR. SPIRO:** I'm asking a question.

10 **BY MR. SPIRO**

11 **Q.** You gave it some weight; right? You didn't believe it was
12 a total lie; did you?

13 **A.** It's hard to get back into my mindset back then as to how
14 much weight I gave that. Looking back, it's hard to say.

15 **THE COURT:** It may be useful to clarify a time frame
16 here. I'm not sure. As of what date?

17 **BY MR. SPIRO**

18 **Q.** Let's jump right to "funding secured," the end of the
19 tweet. So you can see that -- the two words at the end of the
20 tweet on your screen?

21 **A.** I do.

22 **Q.** Okay. And that statement to you meant that there was an
23 organization with funding and funding had been vetted; correct?

24 **A.** Correct.

25 **Q.** And funding vetted to you meant that the funds were

1 available; right?

2 **A.** No. More than just available. To me, it meant that Elon
3 and Tesla had vetted those funding sources.

4 **Q.** Okay. Would you agree with this statement, that the
5 meaning to you is that it had been reviewed and that those
6 funds were available? Is that an accurate statement?

7 **A.** Beyond just available. My feeling was that there had been
8 some critical review of those funding sources.

9 **Q.** You didn't even really consider what it meant, though, to
10 check that the group had funds in terms of process; right?

11 **A.** I saw the "funding secured" as part of the tweet.

12 **Q.** Sure, sure. But we're now talking about, right, "funding
13 secured" to you meant there was an organization that had
14 funding and the funding had been vetted by Tesla; right?

15 **A.** Correct.

16 **Q.** So what I'm asking you is, focusing on the vetting part,
17 you didn't even consider what it meant that -- what "vetted"
18 meant? What they would do to vet it?

19 **MS. TRIPODI:** Objection, Your Honor.

20 **THE COURT:** Overruled.

21 **A.** I thought that there was a critical examination of those
22 funding sources and they had been reviewed by Tesla and the
23 board.

24 **BY MR. SPIRO**

25 **Q.** Well, did you have an understanding as to how they would

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1 vet whether or not funding was secured?

2 **A.** I didn't have a detailed understanding of how the vetting
3 process takes place.

4 **Q.** Okay. And isn't it true that you were just looking at
5 whether Tesla and Elon had ensured that the finances that were
6 stated were available? Would you agree with that statement?

7 **A.** Could you --

8 **Q.** Sure.

9 **A.** -- maybe rephrase that question?

10 **Q.** Yeah. In terms of what "vetted" meant, it meant to you,
11 quote, "Just Tesla and Elon ensuring that the finances that
12 were stated were available;" fair?

13 **A.** No. Beyond just available. I -- I thought that there had
14 been a -- some critical analysis, some critical review of those
15 funding sources and those funding sources were committed.

16 **Q.** Okay. Well, let's look at what you said at your
17 deposition. 57, Line 25 to 58, Line 10.

18 **MR. SPIRO:** If we could play that for the jury?

19 **THE COURT:** Before you do, let me look at it.

20 **MR. SPIRO:** Sure.

21 **THE COURT:** 57, Line 25, through what?

22 **MR. SPIRO:** Through 58, Line 10.

23 **MS. TRIPODI:** Your Honor, object. Completeness.

24 **THE COURT:** Well, what do you suggest to address
25 completeness?

FRIES - CROSS / SPIRO

1 **MS. TRIPODI:** Your Honor, this question was asked
2 several times at the deposition in several different ways, and
3 so counsel is selecting an answer here.

4 **THE COURT:** All right. Is there another pairing that
5 you would like to run in addition to this?

6 **MS. TRIPODI:** Yes, Your Honor.

7 **THE COURT:** Okay. Tell us the page.

8 **MS. TRIPODI:** Page 64, Lines 16 through 25.

9 **MR. SPIRO:** There's another five times where he says
10 it the first way, so I'd ask to play all seven for the jury.
11 That would be agreed to.

12 **MS. TRIPODI:** Objection, Your Honor.

13 **THE COURT:** Okay. Hold on.

14 Okay. Play both. Play both segments. Okay. Let's play
15 both segments.

16 **MR. SPIRO:** Can we play -- can we do it in order?
17 We'll do the first one first, what he first said when he was
18 asked in his deposition.

19 (Videotape played in open court, not reported.)

20 **MR. SPIRO:** Okay. And can we just pause for a second,
21 Your Honor?

22 The second clip is actually -- the citations are not
23 correct for the full questions and answers. You have to go
24 63/25 to 64/25. So it's the same end point. You just have to
25 start at 63/25.

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1 I will give the Court a moment to look at that passage.

2 (Brief pause.)

3 **THE COURT:** To page? What's the end point?

4 **MR. SPIRO:** 64/25.

5 **THE COURT:** So basically the entirety of Page 64 with
6 some beginning at Page 63.

7 **MR. SPIRO:** Yes.

8 **THE COURT:** All right. Go ahead and play it.

9 (Videotape played in open court, not reported.)

10 **MR. SPIRO:** We're frozen.

11 **MR. KOTARSKI:** That's the end of it.

12 **THE COURT:** That's the end of it.

13 **BY MR. SPIRO**

14 **Q.** There were lots of things that you did not take the phrase
15 "funding secured" to mean. You didn't consider whether or not
16 there was a written agreement?

17 **A.** Yeah. I think -- I had assumed at the time that there was
18 negotiations still taking place.

19 **Q.** Okay. You didn't consider what steps were completed?

20 **A.** Well, I considered that the funding had been secured.
21 That was part of the tweet.

22 **Q.** Sure. Which means to you that the funding had been
23 vetted; right? We talked about that.

24 **A.** Yes.

25 **Q.** But other than that the funding had been vetted, you

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1 didn't have any view or consideration as to what other steps
2 had been taken?

3 **A.** Yeah. I had no knowledge of what steps were being taken.

4 **Q.** And you didn't even consider in your mind at the time what
5 next steps had to be taken?

6 **A.** It's hard to get in my mind back then exactly.

7 **Q.** And what you really took away, other than that the funding
8 had been vetted, was that there -- that this company had an
9 interest in purchasing Tesla to take them private and that they
10 had the financial means to do that; right?

11 **A.** Well, beyond just the means. I believe that there was
12 some vetting just to -- you know, to reach that statement that
13 funding was secured.

14 **Q.** And in terms of the board and their role in this, they are
15 not mentioned in the tweets; right?

16 **A.** They are not mentioned in the tweet.

17 **Q.** And from your perspective, you understood that the board
18 would be sellers in this deal; right?

19 **A.** I had assumed in this case that Tesla spoke for the board.
20 I mean, Elon had spoke for the board.

21 **Q.** I'm not sure I understood that. You understood that Tesla
22 was the seller. The Board of Directors and Tesla were the
23 seller of the company?

24 **A.** That's correct, yes.

25 **Q.** Okay. And you did not believe that the board, the seller,

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1 had completed its steps for evaluating the transaction because
2 the transaction hadn't closed yet and it was still being
3 negotiated; right?

4 **A.** Could you ask that question again?

5 **Q.** Sure. You believed that the board, as the seller, still
6 had steps to go in evaluating the transaction and it had not
7 closed yet?

8 **MS. TRIPODI:** Objection, Your Honor. Misstates the
9 testimony.

10 **THE COURT:** Well, he's asking a question. He's not
11 testifying. So he's asking a question. He can say "yes" or
12 "no."

13 **A.** I knew the deal hadn't been finalized.

14 **BY MR. SPIRO**

15 **Q.** And you believed it was still being evaluated; correct?

16 **A.** I believed it was still being negotiated.

17 **MR. SPIRO:** Well, let's play 69, Line 8 to 69, Line
18 16.

19 **THE COURT:** Okay. Hold on.

20 (Brief pause.)

21 **THE COURT:** All right.

22 (Videotape played in open court, not reported.)

23 **THE COURT:** I think you need to -- you need to -- we
24 need to replay it. The sound went out. You skipped something.

25 (Videotape replayed in open court, not reported.)

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1 **THE COURT:** I think that's as much as you wanted;
2 right?

3 **BY MR. SPIRO**

4 **Q.** So, again, the board continuing to evaluate the potential
5 transaction would have been consistent with your understanding
6 of Mr. Musk's tweet; correct?

7 **A.** Yeah. I think -- you know, continued evaluation,
8 continued vetting.

9 **Q.** Sure. Because you assumed that an agreement had not been
10 reached; right?

11 **A.** Yes. I knew the deal hadn't been finalized.

12 **Q.** They were just taking steps to evaluate the potential
13 transaction; right?

14 **A.** It felt that the funding had already been vetted,
15 because -- because the tweet said "funding secured."

16 **Q.** But other than that one thing which you've testified a few
17 times, that you thought the funding had been vetted, you
18 believed -- your assumption was the board was merely taking
19 steps to evaluate the potential transaction; true?

20 **A.** Maybe the better word is "negotiating."

21 **Q.** Okay. Well, whether it's the better word today at your
22 testimony, when you were deposed in this case, you used the
23 word "evaluating;" is that fair?

24 **A.** Yeah. My deposition is my deposition.

25 **Q.** Okay. And just again, to remind the jury, you did not buy

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1 on August 7th. You bought on August 8th; right?

2 **A.** Yes, August 8th.

3 **Q.** At the time of the tweet and your decision to make the
4 purchase, it is true that, quote, your thinking is for the
5 funding to be secured, that they would have expressed a strong
6 interest and they would have been vetted by Tesla and Tesla
7 would have come to the understanding that those funds were
8 available.

9 That was your conclusion; true?

10 **A.** Can you rephrase the question?

11 **Q.** Sure. At the time of the purchase your thinking was for
12 the funding to be secured, that they would have expressed a
13 strong interest, and they would have been vetted by Tesla, and
14 Tesla would have come to the understanding that those funds
15 were available. That was your conclusion; right?

16 **A.** More than a strong interest. My thinking at the time was
17 that there was an offer on the table.

18 **Q.** Okay. Well, let's look at your testimony. 65, Line 9 to
19 65/25.

20 **MR. SPIRO:** And play it for the jury, please.

21 I will give the Court a moment, but that was a quote I
22 read from the deposition.

23 **BY MR. SPIRO**

24 **Q.** And the quote -- while the Court is looking, the
25 deposition clip that I'm asking you about was at the end of all

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1 your other statements when you were asked to summarize.

2 And so I'm going to see -- I'm going to wait for the
3 Court's okay and then play that for you and see if that
4 refreshes your memory.

5 **THE COURT:** Down to line what? To Line 18 or 25?

6 **MR. SPIRO:** 65, Line 9 to 65, Line 25.

7 **THE COURT:** All right. You can play it.

8 (Videotape played in open court, not reported.)

9 **BY MR. SPIRO**

10 **Q.** Is that the testimony you gave at your deposition?

11 **A.** Yes, that is me.

12 **Q.** You stand by that sworn testimony?

13 **A.** I do.

14 **Q.** Now, the following day when you purchased the Tesla
15 shares, at that time you believed Mr. Musk's tweets were
16 100 percent technically accurate; true?

17 **A.** Correct.

18 **Q.** Okay. And as you testified, the funding being subject to
19 financial due diligence, that would have made that shorthand
20 statement in the tweet "funding secured" technically inaccurate
21 in your mind; right?

22 **A.** Right.

23 **Q.** And if, as you testified, the funding being subject to
24 other due diligence, that would have made Mr. Musk's shorthand
25 statement "funding secured" technically inaccurate in your

1 mind; right?

2 **A.** Can you rephrase that question?

3 **Q.** Sure. As you testified, the funding being subject to
4 other due diligence, that would make Mr. Musk's shorthand
5 statement "funding secured" technically inaccurate in your
6 mind?

7 **A.** Yes.

8 **Q.** And --

9 **MS. TRIPODI:** Excuse me, Your Honor. I think
10 Mr. Bernstein might be getting tired. Do you think we can take
11 the board down?

12 **THE COURT:** Yeah. I don't think we need that any
13 more.

14 **MR. SPIRO:** Well, I need it for one more minute and
15 then I will be done with it. But I appreciate the concern.

16 He gave me the thumbs up. I think he's okay for one more
17 minute.

18 **BY MR. SPIRO**

19 **Q.** And as you testified, funding being subject to its own
20 review process of obtaining approvals, that would have made the
21 shorthand "funding secured" technically inaccurate in your
22 mind; right?

23 **A.** Yeah.

24 **Q.** Okay.

25 **MR. SPIRO:** Can we put up Exhibit 53?

1 (Document displayed)

2 **BY MR. SPIRO**

3 **Q.** So this is the blog post that's in evidence, "Update on
4 Taking Tesla Private" of August 13th where Mr. Musk explains
5 what the phrase "funding secured" means to him. And it's
6 entitled "Why did I say 'funding secured'?"

7 And if we look down at the paragraph sort of following the
8 August 7th announcement, it says:

9 "I have continued to communicate with the
10 managing director of the Saudi fund. He has
11 expressed support for proceeding subject to
12 financial and other due diligence and their
13 internal review process for obtaining
14 approvals."

15 Do you see that?

16 **A.** I see that.

17 **Q.** Okay. And that's on August 13th. And on August 13th you
18 were not influenced to sell your stock at that time.

19 So "funding secured" to you -- all these things are still,
20 there, but "funding secured" to you is technically inaccurate,
21 and you were not influenced to sell your --

22 **MS. TRIPODI:** Objection, Your Honor.

23 **THE COURT:** Let him finish the question.

24 **MR. SPIRO:** Thank you, Your Honor.

25 **THE COURT:** Maybe you should start all over.

FRIES - CROSS / SPIRO

1 **MR. SPIRO:** Sure.

2 **BY MR. SPIRO**

3 **Q.** And on August 13th, you were not influenced to sell your
4 stock; correct?

5 **MS. TRIPODI:** Same objection.

6 **THE COURT:** Wait, wait. Hold on. I'm not sure what
7 the objection is.

8 **MR. SPIRO:** Neither am I.

9 **MS. TRIPODI:** Objection, Your Honor. He
10 mischaracterizes the witness's prior testimony.

11 **THE COURT:** I didn't hear any characterization.

12 You can answer the question. Overruled.

13 **BY MR. SPIRO**

14 **Q.** Can you answer the question, please?

15 **A.** I did not see the blog post.

16 **Q.** Well, you're saying you didn't see this blog post?

17 **A.** I don't recall seeing the blog post, no.

18 **Q.** Okay. So now you don't recall. You don't recall one way
19 or the other?

20 **A.** I don't believe I saw the blog post.

21 **Q.** I don't mean to mix your words, but this is, you know, a
22 serious case. We're in federal court. I have to ask you
23 follow-up questions.

24 It's -- I take your testimony to mean that now you're
25 saying you don't remember one way or another whether you saw

1 the blog post?

2 A. I have no recollection of seeing the blog post.

3 Q. You didn't sell on August 13th; true?

4 A. True.

5 Q. Okay. And, I mean, you testified on direct examination
6 about how you had been looking at the stock for some time;
7 right?

8 A. That's correct.

9 Q. Following it in the news; right?

10 (Brief pause.)

11 Q. Correct?

12 A. Correct.

13 Q. You said for the month after Mr. Musk's tweet there was a
14 lot of activity going on related to Tesla; right?

15 A. I believe there was some movement in the stock price, yes.

16 Q. Okay. And you were monitoring that activity; right?

17 A. Yes.

18 Q. And you were monitoring it because it was moving pretty
19 dramatically based on the news; right?

20 A. Yes.

21 Q. And you told this jury that while all these other things
22 were in your mind, this "funding secured" shorthand tweet was
23 this moment of importance in your decision, and you're telling
24 this jury that the major front page of CNBC announcement, where
25 Mr. Musk explains what "funding secured" means a few days

FRIES - CROSS / SPIRO

1 later, you're saying you don't remember seeing it?

2 **A.** I don't remember seeing it.

3 **MS. TRIPODI:** Objection. Asked and answered.

4 **THE COURT:** Overruled.

5 **BY MR. SPIRO**

6 **Q.** And because you know, sir, that if you saw that blog post
7 and you didn't sell your stock, that that would greatly damage
8 the plaintiff's case; right?

9 **MS. TRIPODI:** Objection. Calls for speculation.

10 **THE COURT:** Sustained.

11 **BY MR. SPIRO**

12 **Q.** You don't sell your stock on August 14th either; right?

13 **A.** Correct.

14 **Q.** Or August 15th; right?

15 **A.** Correct.

16 **Q.** And, you know, you testified in direct about your reasons
17 for being here and doing this.

18 In September you started Googling around looking to see if
19 there was a lawsuit; right?

20 **A.** After I sold my shares, I did Google to see if there was
21 any litigation as a result of the tweet.

22 **Q.** So you're saying that the Googling started after you sold
23 your shares?

24 **A.** Yes. I believe so.

25 **Q.** You're not positive that you didn't see the lawsuit before

FRIES - CROSS / SPIRO

1 you sold your shares, are you?

2 **A.** No. I didn't see a lawsuit prior.

3 **Q.** Okay. So you're in September. You're Googling. And you
4 saw a -- a solicitation, an advertisement pop up that you
5 clicked on; right?

6 **A.** I don't think it was an advertisement. I believe it was
7 linked to their website, the law firm's website.

8 **Q.** Right. The Levi and Korsinsky announcement about you
9 having to fill out a form where you were -- where you then
10 signed up to be a potential plaintiff; right?

11 **A.** Not signed up to be a plaintiff, but signed up to be part
12 of the class.

13 **Q.** Okay. And that link indicated that a suit was filed on
14 August 10th -- this is what Levi and Korsinsky is announcing --
15 that has the class period and the fraud revealed on August 8th;
16 right?

17 **A.** I don't recall the dates.

18 **Q.** Well, I can hand you up, which is 1030, the announcement
19 and draw your attention to that on September 5th Levi and
20 Korsinsky, same firm as here today --

21 **MS. TRIPODI:** Objection, Your Honor. This exhibit has
22 not been disclosed.

23 **MR. SPIRO:** I'm just refreshing his recollection.

24 **THE COURT:** If you're going to use it to refresh
25 recollection, you're not going to describe it. You can't

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1 describe the contents. You just give it to him.

2 **MR. SPIRO:** Right, right, right. Correct.

3 **THE COURT:** Okay? Where you started talking about the
4 contents, that's not proper.

5 **MR. SPIRO:** In my previous question.

6 **THE COURT:** Yeah. So just ask him to read it.

7 **MR. SPIRO:** Okay.

8 (Whereupon document was tendered to the witness.)

9 **BY MR. SPIRO**

10 **Q.** Can you read what I've put in front of you? At least the
11 first -- the top of the page, top left, "Levi and Korsinsky
12 Announcement."

13 **A.** Yes, yeah. It starts with "On August 10th" --

14 **THE COURT:** You're not supposed to read it.

15 **THE WITNESS:** Oh, I'm sorry.

16 **THE COURT:** It's been given to you to see if it
17 refreshes your memory about whatever the question is. You read
18 it and you put it down actually. Don't look at it again.

19 **BY MR. SPIRO**

20 **Q.** After you read that paragraph -- I won't make you read the
21 whole announcement -- you can put it down and I'll ask you one
22 more follow-up question on this.

23 The paragraph under the -- the September 5 time.

24 (Witness complied.)

25 **A.** Okay. I read the first paragraph.

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1 Q. Okay. And does that refresh your recollection that the
2 suit that you were signing up for was filed on August 10th and
3 had the class period and fraud revealed on August 8th?

4 A. That's what it states.

5 Q. And that advertisement, solicitation, link, whatever you
6 want to call it, that's what was -- what influenced you to sign
7 up for -- sign the form and send in to Levi and Korsinsky your
8 interest in potentially participating in the shareholder
9 action; true?

10 A. Yes. True.

11 Q. Now, from the time that you signed up for, based on this
12 announcement in September of 2018, to be part of a class where
13 the fraud was revealed on August 8th, you realized, sir, that
14 you bought on August 8th; true?

15 A. True. I bought on August 8th.

16 Q. Okay. And what you were signing up to be part of here was
17 a class and a case that had the fraud revealed on August 8th;
18 right?

19 A. Correct.

20 Q. But so interested were you in being part of this that you
21 still did sign up; right?

22 A. Correct.

23 Q. And two days after this September 5th announcement, two
24 days later, you, on September 7th, sold your shares; right?

25 A. Correct.

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1 Q. And after that point in time, you didn't hear from
2 plaintiff's counsel. Even though it was their announcement,
3 you didn't hear from them in 2018; right?

4 A. I didn't hear from them in 2018, no.

5 Q. Or 2019?

6 A. That's correct.

7 Q. Or 2020?

8 A. That's correct.

9 Q. Late 2021, three-some years later, you heard from
10 plaintiff's counsel?

11 A. That's correct.

12 Q. And fair to say that when you were influenced to sell your
13 shares in September of 2018, your memory of events and
14 circumstances and what you saw and didn't see was fresher in
15 your mind than when you first spoke to plaintiff's counsel;
16 fair?

17 A. Can you rephrase the question?

18 Q. Sure.

19 At the time in September of 2018 when you, sir, were
20 influenced to sell your shares, your mind of the events and
21 circumstances regarding this was fresher than it was three
22 years later when you first spoke to the plaintiff's lawyers;
23 true?

24 A. That sounds like a fair statement.

25 Q. I agree.

FRIES - REDIRECT / TRIPOLDI

1 And since the time -- now four and a half years later
2 about -- after you began speaking with plaintiff's lawyers,
3 you've spent many days and many hours speaking with them in
4 preparation for your testimony here today; fair?

5 **A.** That's correct.

6 **Q.** And of all of the people that clicked on this form, saw
7 this advertisement, filled that out, of all those people they
8 pick you to testify; true?

9 **A.** They picked me, yes.

10 **MS. TRIPODI:** Objection, Your Honor.

11 **THE COURT:** Overruled.

12 **MR. SPIRO:** I have no further questions for this
13 witness.

14 **THE COURT:** All right. Redirect?

15 **REDIRECT EXAMINATION**

16 **BY MS. TRIPODI**

17 **Q.** Mr. Fries, counsel referenced the "funding secured" tweet
18 as shorthand. Did you consider "funding secured" to be
19 shorthand?

20 **A.** No, I did not.

21 **Q.** Now, during cross, Mr. Spiro asked you a number of
22 questions regarding how you interpreted "funding secured." Do
23 you remember that?

24 **A.** That's correct.

25 **Q.** Was it your understanding from Mr. Musk's tweet that the

FRIES - REDIRECT / TRIPOLDI

1 funding was merely available if Mr. Musk wanted it, or did
2 "funding secured" mean something different to you?

3 A. To me, it meant more than that.

4 Q. What did it mean to you?

5 A. It meant that there was a committed party and that those
6 funds had been vetted.

7 Q. Mr. Spiro also asked you about the Tesla board's
8 involvement with the going-private. Do you remember that?

9 A. Yes.

10 Q. Did you have any knowledge of the Tesla board's
11 involvement in the going-private?

12 A. No.

13 Q. Did you make any assumptions regarding the Tesla board's
14 involvement in the going-private?

15 A. Yeah. I made an assumption that they were giving kind of
16 a careful consideration of the funding sources. They were
17 committed to it and committed to a plan forward.

18 Q. So if the board had taken no steps to evaluate whether
19 funding was secured, in your opinion, would "funding secured"
20 have been false?

21 A. Correct.

22 Q. Mr. Spiro also showed you the August 13th blog post. Did
23 you see the August 13th blog post?

24 A. I have no recollection of seeing that blog post.

25 Q. And after August 13th, August 14th, August 15th, did you

1 still believe that funding was secured?

2 **A.** I did.

3 **MS. TRIPODI:** Your Honor, I have no further questions.

4 **THE COURT:** Thank you.

5 Anything on recross?

6 **MR. SPIRO:** No, Your Honor. Thanks.

7 **THE COURT:** All right. Thank you, Mr. Fries. You may
8 step down.

9 This witness is excused; correct? There is no plan to
10 recall this witness?

11 **MS. TRIPODI:** No, Your Honor. No plan to recall the
12 witness.

13 **THE COURT:** All right.

14 **MS. TRIPODI:** Thank you.

15 (Witness excused.)

16 **THE COURT:** All right. Well, why don't we take a
17 short early -- we'll do an early break. Normally we break at
18 10:00, but since we've got another witness, let's not chop it
19 up.

20 So we'll take our first morning break. Reminder, please
21 do not discuss this case with anyone. Do not attempt to do any
22 research on your own, and do not form any opinions until this
23 case is submitted to you for deliberation.

24 We'll see you in 20 minutes.

25 **THE CLERK:** All rise for the jury.

1 (Recess taken from 9:45 a.m. to 10:01 a.m.)

2 (The following proceedings were held outside of the
3 presence of the Jury)

4 **THE COURTROOM DEPUTY:** Court is reconvened.

5 **THE COURT:** Okay. Let's take up the issue of the
6 sealed dispute.

7 I don't know if you had any opportunity to meet and
8 confer.

9 **MX. KIM:** Thank you, Your Honor. Again, this is Mx.
10 -- M-X -- Liz Kim on behalf of Mr. Durban and Silver Lake.

11 We have attempted to meet and confer via email several
12 times prior to appearing this morning, but we have not had an
13 opportunity to speak, other than to confirm that the parties'
14 positions have not changed.

15 To be clear, Your Honor, the motion in limine and the
16 reason we're here is because these exhibits, you've already
17 ordered them sealed. You ordered them sealed in connection
18 with the parties' summary judgment briefing. And you had
19 issued an order specifically finding that both Silver Lake and
20 another third party, Goldman Sachs, had submitted narrowly
21 tailored redactions that satisfied the compelling reason
22 standard.

23 I understand the parties seem to think that the exhibit
24 should be presented to the jury. As local counsel, I am not in
25 a position to argue about the merits of the substance of this

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1 case. Our lead attorneys at Debevoise are not able to be here
2 this morning because they're across the country.

3 Part of the problem here, Your Honor, is that the parties
4 have not been giving adequate notice to any of the third
5 parties whose confidential documents they're attempting to use.

6 **THE COURT:** All right. Let's get to it. What are
7 the -- show me the -- what are they?

8 **MX. KIM:** So the exhibit that's at issue today, I
9 believe, is No. 179.

10 **MR. APTON:** Your Honor, if it would be easier, I have
11 a copy of 179 with highlights indicating what would be
12 redacted.

13 **THE COURT:** Okay. Pass it up, please.

14 **MR. APTON:** If we could hand that up.

15 (Document handed up to the Court)

16 (The Court examines document)

17 **THE COURT:** All right, so what is the highlighted
18 stuff?

19 **MX. KIM:** So, Your Honor, before I dive into that,
20 while I will do my best, I do want to just note that Julie
21 Riewe, who's been admitted and is counsel of record in this
22 case for Mr. Durban, is available and standing by
23 telephonically to argue as to the merits of why this material
24 should be -- should remain under seal.

25 **THE COURT:** Okay. Is that person available by phone

1 right now?

2 **MX. KIM:** Yes. They're standing by, Your Honor.

3 **THE COURT:** Can we admit them by some phone method?

4 **THE COURTROOM DEPUTY:** I'd have to call them from our
5 phone to put them on the speaker.

6 **THE COURT:** Well, why don't you do that.

7 **MR. APTON:** Your Honor, if I may, this is relating to
8 a potential deal that never happened, from four and a half
9 years ago. This is material that is relevant for one reason.
10 This case. It has no proprietary or trade-secret or commercial
11 value. Silver Lake's not at risk of losing business. And, as
12 counsel pointed out, it has been publicly on the docket for the
13 last few months. That was initially an oversight from counsel.
14 But, nonetheless --

15 **THE COURT:** So this is about a potential scenario
16 involving Silver Lake, and Tesla?

17 **MX. KIM:** Yes, Your Honor.

18 **MR. APTON:** That's right. Because Silver Lake was
19 involved in the potential go-private, and so they were working
20 with Tesla, late August, to put this material together.

21 **THE COURT:** And why do you need this detail?

22 **MR. APTON:** Elon Musk --

23 **THE COURT:** I mean, why should this detail -- why does
24 it need to be -- need to be made public?

25 **MR. APTON:** Well, Elon Musk received copies of this.

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1 It's relevant for this case. And we need it to be shown to the
2 jury. So long as it's shown to the jury in evidence, we're
3 okay with that. But if the public outside of this courtroom is
4 now allowed to see it, then that's for Your Honor --

5 **THE COURT:** That's the issue. Certainly, I don't
6 think the -- the argument that the jury can't see this. As
7 long as it's kept under seal from the public. I mean, that's
8 your concern, correct?

9 **MX. KIM:** That is our primary concern, Your Honor.

10 **THE COURT:** And so then the question I have as the
11 Court is whether the public has a compelling interest in seeing
12 this level of detail, at the higher standard that applies,
13 since this is dispositive against the trial. Is there a
14 compelling interest not to allow the public to see it? Because
15 generally the presumption is that the public has an interest in
16 seeing all the evidence.

17 **MR. APTON:** Not just that, Your Honor. Practically,
18 when the exhibit is introduced, is Your Honor going to clear
19 the courtroom and have people come back in? I just don't see
20 the reason to keep it under seal and potentially interfere with
21 the pace of the trial or the examination.

22 **MX. KIM:** I'd just note that we could have addressed
23 this in advance, had the parties provided adequate notice or
24 moved to unseal the document, which is still the subject of a
25 sealing order, Your Honor. We're here --

1 **THE COURT:** Well, that's right. This should have
2 been -- since there was a sealing order, the proper method
3 would have been to move to unseal, and do this in an orderly
4 way.

5 **MR. APTON:** Understood, Your Honor.

6 **THE COURT:** So can we get counsel on the line?

7 **THE COURTROOM DEPUTY:** Counsel, can you hear us?

8 (Attorney Julie Riewe appears telephonically)

9 **MS. RIEWE:** Yes. Can you hear me?

10 **THE COURTROOM DEPUTY:** We can.

11 **THE COURT:** Yeah. We're going to try turning you up
12 there. Can you speak again?

13 **MS. RIEWE:** Great. Thank you very much. Julie Riewe
14 from Debevoise for Mr. Durban. I heard most of what was on the
15 Zoom audio link, but missed the last maybe minute or so when it
16 was being connected.

17 Your Honor, the -- Silver Lake's concern here is that
18 Your Honor has already ruled on -- on these redactions. We do
19 think they are proprietary, and reveal Silver Lake's particular
20 methodology for evaluating companies. And that remains true
21 today, not just five years ago or four and a half years ago at
22 the time of this transaction.

23 And as we noted in our brief at the time when Your Honor
24 ruled on this question, that that methodology is of significant
25 value to competitors because they could use Silver Lake's

1 analysis and perspectives to apply to other companies, and
2 stand in the way of Silver Lake winning -- winning
3 opportunities for investment.

4 So, you know, we think that Your Honor's ruling was
5 correct initially, and so we would ask that Your Honor revisit
6 that -- not revisit that, and continue to view these correctly
7 as proprietary information of Silver Lake.

8 I think -- when I lost the audio contact on to the Zoom
9 link, I think you all were discussing whether there was some
10 narrower approach. And I think our primary concern is that
11 these exhibits would be filed on the ND Cal website,
12 (Inaudible) the rest of the jury, obviously.

13 But, you know, I think having these publicly released is
14 really our concern. And we don't think the fact that these --
15 that these were filed improperly in contravention of the
16 Court's ruling at the time is relevant to this question.

17 We'll fix that on the docket now. But, you know, we
18 absolutely were aware that that would happen. And I think this
19 is a separate question, on the merits.

20 **THE COURT:** All right. Let me ask you. If what is
21 filed on the ND Cal docket, which, where we're posting evidence
22 is the redacted copy, but the unredacted copy is used in the
23 courtroom so that the participants in the court and those who
24 are in the courtroom can see it, but obviously nobody outside
25 the courtroom -- and we do have an overflow courtroom with a

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1 video. But other than that, it's just people in the courthouse
2 can see it, but it would not be posted, it would be posted in
3 its redacted form for the greater public to see, would you have
4 any objection to that?

5 **MS. RIEWE:** Obviously we'd prefer the narrower ruling,
6 Your Honor, but if otherwise the alternative is to admit them
7 unredacted, yes, we would certainly prefer a redacted posting
8 to the ND Cal.

9 **THE COURT:** All right. Then that's what I will order,
10 that -- for the purpose of the trial. Because otherwise, if we
11 have to treat this as a sealed document that only the jury can
12 see, then we're going to have to make copies of this, and then
13 all that sort of the stuff.

14 And given that this is not being broadcast, we're not on
15 Zoom to the public other than audio, I'm going to allow the
16 parties to use the document, unredacted, but order our staff
17 that when we file this document with the repository which we've
18 made available to the public just so they can see all the
19 exhibits, that the redacted form will appear there. Because I
20 think that they've made a fair argument that they show
21 methodology. And even if it's specific to this deal,
22 there's -- there are some pretty strong interests.

23 **MX. KIM:** Your Honor, so you are aware, there are at
24 least two, possibly three other exhibits that are Silver Lake
25 documents that the parties have disclosed on their joint

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1 exhibit lists that are not at issue for today. How would you
2 like us to address those? I believe that some of them are text
3 messages that the Court briefly addressed yesterday.

4 And I hope that the parties and Silver Lake are able to
5 work out a mutually agreeable solution that tracks the guidance
6 you've just provided. But if we are unable to do so, how would
7 you like us to make our --

8 **THE COURT:** Well, what I'd like, you're going to have
9 to come back, and I'll have to rule on it. I'm hoping, based
10 on today's discussion, you all can work that out.

11 **MX. KIM:** (Nods head)

12 **THE COURT:** I will say there is one document -- I
13 don't know if it concerns Silver Lake or not. But there is a
14 document that -- that long email string that has a whole bunch
15 of stuff in there, some of which is relevant, but a lot of
16 which is about other people. I assume that that's going to be
17 selectively used.

18 **MR. APTON:** Is Your Honor referring to text messages?

19 **THE COURT:** Yeah, the text messages.

20 **MR. APTON:** Oh, I think we -- I've spoken to counsel,
21 and we'll redact personal informational and phone numbers.

22 **THE COURT:** Well, there's also a number of exchanges
23 with people who seem to have nothing to do with this
24 transaction. I mean, it was like pages long, as I recall.

25 **MR. APTON:** Yeah. Your Honor, without having the

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1 exhibit in front of me, I don't want to commit to something,
2 but Your Honor's always --

3 **THE COURT:** Well, that's one where I did want --

4 **MR. APTON:** I think defense counsel and I are on the
5 same page on this, and so we will work it out.

6 **THE COURT:** All right.

7 **MX. KIM:** Because I believe you're looking at 182,
8 Your Honor. And that is an exhibit that also was the subject
9 of a motion to seal in connection with the summary judgment
10 briefing.

11 And Your Honor granted Silver Lake's redactions, proposed
12 redactions of this document which would include, in addition to
13 the personally identifying information, other irrelevant
14 information. Including, you know, the location of Mr. Durban's
15 children at some date and time, his personal cell phone number,
16 and the identity of a Silver Lake investor which the Court has
17 already ruled is proprietary and confidential business
18 information.

19 **THE COURT:** Well, my understanding is that this big
20 document was keyed on certain exchanges between Mr. Musk and --
21 Yasir, or -- I forget who it was.

22 **MR. APTON:** Your Honor, I believe these text messages
23 are between Mr. Durban, Egon Durban, who works at Silver Lake,
24 and various people. Some of which are involved in this case,
25 some of which are not. And so for the text messages that are

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1 not relevant to this case, we could redact those out, and it's
2 not a problem.

3 **THE COURT:** Why don't you do that, show that to
4 counsel --

5 **MR. APTON:** Absolutely.

6 **THE COURT:** -- as soon as you can.

7 **MR. APTON:** Thank you, Your Honor.

8 **THE COURT:** And if there is a dispute, I guess I'll
9 see you back here.

10 **MX. KIM:** Thank you very much, Your Honor.

11 **THE COURT:** Thank you.

12 **MR. APTON:** Thank you.

13 **THE COURT:** All right. Well, I think our 20 minutes
14 has expired. So let's bring the -- oh, let me -- I will read
15 to you the expert instruction that I have crafted.

16 It will read as follows:

17 "During the trial, you will hear testimony
18 from witnesses who will testify to opinions
19 and reasons for their opinions. This opinion
20 testimony is allowed because of the education
21 and experience of this witness. The expert
22 may testify as to his or her understanding of
23 certain facts. The expert is allowed to do
24 so in order to explain the basis of their
25 opinion, and to allow you to evaluate their

1 opinion. The facts testified to, however,
2 are themselves not evidence."

3 And then the usual (As read):

4 "Such opinion should be judged like any other
5 testimony..."

6 Et cetera, et cetera. So I think that's a fair and
7 neutral way of doing it. And I intend to read that, to be
8 balanced, in front of every expert witness.

9 **MR. PORRITT:** Thank you.

10 **MR. SPIRO:** Understood. Thank you, Your Honor.

11 **THE COURT:** Okay. Let's bring the jury back.

12 While the jury is coming back, on the Brinkman stuff,
13 we'll get out the formal ruling, but I'm overruling the
14 objections that were remaining with respect to the deposition.

15 Let's see. So there was several objections that were
16 made. And I will explain later. But I -- for purposes of your
17 production, I am overruling the various -- yeah. I don't think
18 there was an exception. I mean, I have to sustain.

19 **MR. SPIRO:** Yes, Your Honor. The -- I think it would
20 be, if the Court was willing, useful to the parties if we could
21 discuss at some point Your Honor's views on the deposition
22 designations, to give us guidance for the rest of the depo
23 designations. And the reason for that, among others, is it
24 allows us to plan better so that we know how much time. Is it
25 going to be a day, is it going to be -- right? Because they

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1 are very lengthy designations. So for witness planning
2 purposes, the earlier we can do that I think is helpful to
3 our --

4 **THE COURT:** All right. Yes, so the earlier you can
5 get it to me -- and if you don't besiege me with 5,000 other
6 things, the quicker I can get to it, so -- which is why -- and
7 it may be for depo excerpts, let's, you know, submit it earlier
8 if you already know what it's is going to be, so I have at
9 least a little time, because now I have to read all this and
10 figure out which segments are objectionable, if any, and which
11 are not.

12 **MR. SPIRO:** Right. We're trying to take the Court's
13 guidance as to the exhibits so that, for example, a document
14 produced or an opinion given during the class period versus
15 after is -- we're focusing on things like that, that we think
16 the Court has so indicated.

17 **THE COURT:** Yeah. Depo transcripts is a little
18 trickier, though, because the two-day/one-day thing means I
19 don't get, you know, the full objection and response, and then
20 I've got to read, if it's lengthy depo transcripts -- it's one
21 thing to look at exhibits and rule on those. It's another
22 thing to read hundreds of pages of -- so I'm suggesting maybe
23 if you can advance that by a day, if we have a rule that if you
24 know you're going to present a witness by depo,
25 three-day/two-day instead of two-day/one-day?

JURY INSTRUCTION

1 **MR. SPIRO:** So I think we should just give them all to
2 the Court, frankly. I mean, and then --

3 **THE COURT:** Even better.

4 **MR. SPIRO:** And then if the Court would indulge us on
5 a brief, you know, 15-minute sort of -- just so we can explain
6 to the Court at least our thinking, and then that'll guide the
7 rest of the trial and make it efficient.

8 **MR. PORRITT:** And I think with your first set of
9 rulings on Mr. Brinkman, we'll obviously take that, and we'll
10 use that as precedent, for want of better term, for this case.
11 And we can apply those rulings, we'll understand.

12 **MR. SPIRO:** Well, hopefully after hearing a brief word
13 from the defense before it becomes, quote-unquote, precedent.
14 But with that, I understand.

15 **THE COURT:** Right.

16 **MR. PORRITT:** And we have effectively -- we've
17 exchanged them with the parties a long time ago and --

18 **THE COURTROOM DEPUTY:** All rise for the jury.

19 (The following proceedings were held in the presence of
20 the Jury)

21 **THE COURT:** All right. Have a seat, everyone.
22 Welcome back. Thank you.

23 We are going to proceed with the next witness. But first
24 let me give you an additional instruction.
25

JURY INSTRUCTION**JURY INSTRUCTION****BY THE COURT**

During the trial, you will hear testimony from witnesses who will testify to opinions and reasons for their opinions. This opinion testimony is allowed because of the education and experience of the witness.

Now, the expert may testify as to his or her understanding of certain facts. The expert is allowed to do so in order to explain the basis of their opinion, and to allow you to evaluate their opinion.

These facts -- the facts testified to, however, are, themselves, not evidence. Opinion testimony should be judged like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

So with that said, you may call your next witness.

MR. APTON: Your Honor, Adam Apton for plaintiff. We call Professor Subramanian.

THE COURT: All right.

GUHAN SUBRAMANIAN, PLAINTIFF'S WITNESS, SWORN

THE WITNESS: Yes.

THE COURTROOM DEPUTY: Thank you. Please be seated.
You can remove your mask.

Please speak clearly into the microphone. State and spell

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1 your first and last name for the record, please.

2 **THE WITNESS:** Guhan Subramanian. First name
3 G-U-H-A-N, last name, S-U-B-R-A-M-A-N-I-A-N.

4 **THE COURT:** All right. Thank you, Professor.
5 You may proceed.

6 **MR. APTON:** Your Honor, I have an exhibit binder for
7 the witness and one for the Court as well. May I approach?

8 **THE COURT:** All right. Yep.

9 **THE COURTROOM DEPUTY:** Thank you.
10 (Binder handed up to the Court)

11 **DIRECT EXAMINATION**

12 **BY MR. APTON**

13 **Q** Good morning, Professor Subramanian. How are you?

14 **A** Doing fine, thanks.

15 **Q** Good, good, good.

16 Now, you are an expert for the plaintiff, is that correct?

17 **A** Correct.

18 **Q** And you are here today to give expert testimony, correct?

19 **A** Correct.

20 **THE COURT:** You might pull that microphone a little
21 closer to you, and it will pick you up better. Thank you.

22 **BY MR. APTON**

23 **Q** Professor, did you prepare PowerPoint slides for your
24 testimony today?

25 **A** I did, yes.

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1 **Q** And before we see them, why did you do that?

2 **A** Well, I've been a professor at Harvard for 23 years. And
3 when I teach my students I almost always use PowerPoint slides,
4 especially when it's complicated information, because I think
5 the students can learn better when they see it on the screen,
6 but also they're hearing it from me.

7 Now, this isn't my classroom, but similarly, I'm trying to
8 help the jury understand certain complex issues, and so I
9 thought PowerPoint slides would be helpful in that process.

10 **Q** Okay. I appreciate that.

11 **MR. APTON:** If I could introduce the Professor's slide
12 deck, please. And may I publish this to the jury too?

13 **THE COURT:** Yes, you may.

14 (Document displayed)

15 **BY MR. APTON**

16 **Q** Professor, are these the slides you prepared for today?

17 **A** They are, yes.

18 **Q** Okay. Why don't I ask you a little bit more about your
19 qualifications. Can you describe them, please?

20 **A** Sure. And I'll use my slides for that purpose, if that's
21 okay?

22 **Q** Yes.

23 **A** I received an undergraduate degree in economics from
24 Harvard College in 1992. I received my law degree from Harvard
25 Law School in 1998. And also an MBA from Harvard Business

1 School in 1998.

2 I have been on the Harvard faculty since 1999. I
3 currently serve as the Joseph Flom Professor of Law and
4 Business at Harvard Law School, and the Douglas Weaver
5 Professor of Business Law at Harvard Business School. I'm the
6 first person in the history of Harvard to hold tenured
7 appointments at both Harvard Law School, Harvard Business
8 School.

9 (Document displayed)

10 **A** I'm the faculty chair for the program of negotiation, the
11 JD/MBA program, and the Advisory Committee on Shareholder
12 Responsibility at Harvard. I've authored many books, and two
13 case books. One is with the former Delaware Chancellor Bill
14 Allen. Delaware is the home for many public corporations,
15 including Tesla, and so Delaware is a well-known place for
16 business disputes to be resolved.

17 (Document displayed)

18 **A** I teach courses on mergers and acquisitions and corporate
19 law. And also a course called Deals, which is joint before
20 Harvard Law School and Harvard Business School, where we study
21 lots of corporate deals.

22 With respect to management buyouts in particular, I've
23 done a lot of work on MBOs over the years. This case is about
24 a proposed MBO. In particular, one article I will flag for the
25 Court is called Deal Process Design in Management Buyouts. It

1 was published in the Harvard Law Review in 2006. My colleagues
2 in the field picked it as one of the top ten articles in 2016,
3 out of 565 articles that were published in that year.

4 As part of the research for this article, I examined and
5 studied permanently all the management buyouts of public
6 companies that were announced between 2006 and 2015. It was
7 about 45 deals, total. And I'll talk more about that data
8 shortly.

9 I'm also the chairman of the board at LKQ Corporation.
10 LKQ is a Fortune 500 company in the automotive sector. We're
11 the largest recycler of car parts in the world. We have about
12 50,000 employees, and we recycle the parts from about 800,000
13 cars per year.

14 I regularly advise corporate boards and management teams
15 on issues of negotiation and corporate deals. And I've
16 testified in Delaware court but also other courts about 15
17 times at trial, and many more times in deposition.

18 **Q** Professor, did you prepare a resume or CV in connection
19 with this case?

20 **A** I did, yes.

21 **MR. APTON:** May I please show the witness Exhibit 360,
22 Pages 48 to 54?

23 **THE COURT:** Yes.

24 (Document displayed)
25

1 **BY MR. APTON**

2 **Q** Professor, are Pages 48-54 the CV that you prepared for
3 this case?

4 **A** Yes.

5 **MR. APTON:** Your Honor, may I move this portion of
6 Exhibit 360 into evidence?

7 **THE COURT:** Yes. Any objection or further objection?

8 **MR. PRICE:** No further objection beyond hearsay.

9 **THE COURT:** All right. Admitted.

10 (Trial Exhibit 360, Pages 48 to 54, received in evidence.)

11 (Document displayed)

12 **BY MR. APTON**

13 **Q** So Professor, can you explain how your professional
14 experience and background is relevant to the issues in this
15 particular case?

16 **A** Sure. This case is about a proposed management buyout.
17 I'll say more about what management buyouts are in a few
18 minutes, but it's a complicated, fairly intricate kind of
19 transaction. It's heavily choreographed, heavily orchestrated,
20 generally speaking. And I teach about it and I study
21 management buyouts in my research at Harvard.

22 So, for example, I have a course called Deals, which is
23 actually starting this Monday, and in that course Deals we
24 study MBOs frequently.

25 One particular MBO that I'm very familiar with is the

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1 management buyout of the Dell Inc. Dell was a buyout about
2 seven, eight years ago in which Michael Dell in that case
3 actually did take the company private. It's significant in
4 lots of different ways, but one significant similarity is it
5 was a very large MBO. It was about \$20 billion. This one
6 would actually have been much bigger than even Dell. But if
7 you think about comparisons, Dell is a pretty decent
8 comparison. So I know a lot about the Dell MBO because I was
9 involved as an expert witness in that situation as well. And
10 I've written a Harvard Business School case study about Dell,
11 and people who were involved to come to my class to talk about
12 that particular MBO.

13 So I study MBOs, I teach about MBOs. And one particular
14 MBO that's quite relevant here, which is Dell, is something
15 that I've studied quite extensively.

16 (Reporter clarification)

17 **THE WITNESS:** Yes, I'll do my best. Thank you.

18 **MR. APTON:** Your Honor, in light of Professor
19 Subramanian's qualifications, we would move to admit him or
20 deem him an expert to give testimony in this case.

21 **THE COURT:** You have to specify the subject.

22 **MR. APTON:** Oh, relating to the proposed transaction
23 of -- in this case, and management buyouts in general, and
24 customs and practices.

25 **THE COURT:** All right. Any objection?

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1 **MR. PRICE:** No objection.

2 **THE COURT:** All right. He's so certified.

3 **BY MR. APTON**

4 **Q** So, Professor, when plaintiff first retained you as an
5 expert in this case, what is it that they asked you to do?

6 **A** There were two things that I was asked to express opinions
7 about. First was to describe the typical process in a
8 management buyout. And then second, to compare this proposal
9 against that typical process.

10 **Q** And could you tell the jury, generally speaking, what your
11 conclusions were?

12 **A** Yes. In the highest level, my conclusions were twofold.
13 First, there is a typical process for management buyouts.
14 There is some variation in some deals. But that's -- there's a
15 standard template for MBOs. And then, compared to that
16 standard template, this proposal was an extreme outlier. It
17 was preliminary; it was incomplete. It was incoherent in
18 certain ways. It was illusory. It was really very different
19 from the typical process of an MBO.

20 **Q** So I would like you to help us, the Court and the jury,
21 understand those conclusions. Can you advance and elaborate,
22 please?

23 **A** Sure. So there is a standard process for a management
24 buyout. It's not the exact same process every single time, but
25 there's a pretty well-established set of steps.

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1 Just first of all, an MBO, what is it?

2 It's a situation where management, oftentimes the CEO but
3 maybe other managers as well -- in this case it's just the
4 CEO -- offers to buy the other shares of the company at a
5 price. And so it's a going-private transaction. It's a
6 management buyout of the public shares, and the company then
7 becomes private.

8 There are a very well-established set of steps that occur
9 in an MBO. And I'll go through those steps as a typical matter
10 in this slide. The basis for this set of steps is my own
11 research. So I've mentioned already my 45 deals in my MBO
12 database; that is from 2006 to 2015.

13 I also, in connection with my testimony here, created a
14 new sample of MBOs from 2010 to 2021, so updated the sample.
15 It's about 30 deals in that sample. So this broad template is
16 based on my own research, my own observation, but also those
17 more systematic datasets.

18 The first step is the initiation. And this step is
19 important. There's a lot of thought, preparation, care, work
20 that's done in advance of any initiation of an MBO. The fact
21 is, an MBO is very disruptive to the company. And so a CEO
22 doesn't do that casually.

23 What does that mean? It typically means talking to
24 individuals within the company about what will it mean from the
25 company, as a business matter. But almost always, it also

1 means discussing with outside advisers.

2 Bankers will give you a basic idea of how the financing
3 will work, and maybe even run the model, using some
4 illustrative pricing. Lawyers will tell you about the process
5 you need to go through in the MBO. So it's a very
6 thought-through, careful process before you even begin it and
7 bring it to the board.

8 **Q** So, if I could just interrupt you. So all that work is
9 done before the, quote, initiation, correct?

10 **A** Correct.

11 **Q** And so what does an initiation normally look like in an
12 MBO?

13 **A** Well, once you have done all this legwork in advance, you
14 would then take it to -- if it's a different person, you take
15 it to the chairperson of the board. Or if you're the
16 chairperson, as was the case here, you would take it to the
17 lead director.

18 That's typically where you would begin the process, but
19 there's a lot of work that's done even before you take it to
20 that lead director or chairperson of the board.

21 **Q** Okay. So, thank you. Continue, please. What is the
22 second step?

23 (Document displayed)

24 **A** So then there is a response. The company will form what's
25 called a special committee of independent directors. And this

1 is a very important piece because you've got management -- in
2 this case it's the CEO -- looking to buy the company. So
3 they're a buyer; they will want a lower price. The company
4 will want a higher price. So there's an important
5 back-and-forth negotiation that will take place.

6 And in order to be meaningfully engaged in that
7 negotiation, the special committee will be authorized to hire
8 their own bankers and hire their own lawyers. So the CEO would
9 have consulted with the bankers and lawyers, and they'll have
10 those people in place. And then the special committee will be
11 formed, and they will hire their own lawyers, their owner
12 bankers, to help have a meaningful back-and-forth negotiation
13 with the prospective buyer.

14 The next step is a public disclosure of the MBO.

15 (Document displayed)

16 **A** It can happen in different ways. But there's two main
17 places that can happen. First is when the CEO brings the
18 proposal to the special committee. And so in my sample of
19 MBOs, sometimes it where the CEO brings the offer to the board,
20 the board forms a special committee, and they'll announce we
21 have a proposal from Mr. So-and-so or Ms. So-and-so to buy out
22 the company.

23 The other alternative, the big moment would be at the end
24 of that negotiation. So, in general, they'll want to keep it
25 quiet, don't want to disrupt the market, don't want to disrupt

1 the company. They will negotiate with the CEO and their
2 advisers, and they'll try to avoid a public announcement until
3 they've got to an actual deal.

4 The important feature, whether you disclose it at the
5 beginning of the process or the end of that negotiation, is
6 that the special committee really should control that process.
7 It should not be left to the CEO to unilaterally disclose it on
8 their own.

9 And in my sample that I assembled in connection with this
10 matter, I found only one other instance, it was a buyout of
11 Perry Ellis, I think it was, in which the CEO made a unilateral
12 disclosure. Almost always you want the special committee to
13 make the disclosure, and that's for good business reasons. The
14 CEO has their own incentives. They may or may not be in line
15 with the company. And so having the special committee control
16 the public disclosure is very important. And as I said in my
17 sample, it happens almost always the special committee does it
18 and not the CEO.

19 **Q** Professor, with respect to that one example, the Perry
20 Ellis buyout, before the disclosure, if I understood you
21 correctly, how much work was done in the lead-up to that
22 disclosure?

23 **A** Well, that's a good example of the typical process in
24 which the CEO did consult with the bankers and did consult with
25 lawyers before bringing that disclosure to -- bringing that

1 proposal to the company. So, it does follow the standard
2 template, other than this one piece of the public disclosure.

3 **Q** And I don't want to belabor the point, but when you say
4 consult with lawyers and bankers, what does that typically look
5 like in this process?

6 **A** It will be meaningful, substantive negotiation -- not --
7 substantive analysis by the banker and lawyers. So the bankers
8 will be running financial models to explain how this will work
9 as a financial matter. They may do illustrative deal prices
10 and present some analysis around illustrative deal prices.

11 The lawyers will be very involved as well, because it's a
12 carefully choreographed back-and-forth. And so well before you
13 begin anything with the board or special committee, the CEO
14 will want to make sure they understand what are the different
15 steps involved to get from an initial proposal to a final deal.
16 It's a long list of steps, which the lawyers will advise on.

17 **Q** So this analysis, this negotiation, can this be done in
18 something like a 20 or 30-minute phone call?

19 **A** No. It can't be. It's really at least weeks, maybe even
20 months.

21 So as one example, I mentioned the Dell buyout earlier.
22 Michael Dell, who was the CEO -- is the CEO of Dell, Inc., got
23 an inbound inquiry from Southeastern Asset Management. I
24 believe it was in June of 2012. He then spent three or four
25 months talking to Silver Lake, which happens to be the same

1 firm that's involved here. He talked to Wachtell Lipton, which
2 also, again, happened to be involved here. He talked to other
3 firms as well. And only brought to it his board -- in that
4 case, it was the lead director -- I believe it was in
5 September, October of 2012. So three months between the
6 initial approach and his taking it to his board. Lots of work
7 has to be done before you can make that first step.

8 **Q** I see. So I keep interrupting you. We covered step one,
9 initiation; step two, response; step three, public disclosure.
10 What is step four?

11 (Document displayed)

12 **A** Step four is shareholder engagement. So, obviously,
13 shareholders have to be involved in this process. As a formal
14 matter, they are the last step. There's a shareholder vote
15 that would approve the deal. The critical piece here is that
16 it is very rare, if not unheard of, to have outbound
17 shareholder -- shareholder engagement.

18 If you announce the proposal when the offer is first made
19 by the CEO, you might have inbound comments from shareholders.
20 Shareholders will say: I like the deal, I don't like the deal.
21 There could be some inbound.

22 But it is very rare, I would say almost impossible or
23 almost unheard of, to have outbound from the special committee
24 or the CEO to shareholders. And that's for good reasons. In
25 general, the concern is you may be giving certain shareholders

1 some information you're not giving to other shareholders. So
2 in general, you'll have to be very quiet.

3 If there's inbound, you will listen to it, but there's
4 never a back-and-forth with shareholders, because that raises
5 certain concerns about fairness and making sure shareholders
6 have the same information across the board.

7 **Q** So you mentioned inbound versus outbound shareholder
8 engagement, but what does that look like? What is that?

9 **A** Well, so, for example, in the Dell buyout, just as an
10 illustration, the proposal went to the special committee. It
11 was all kept quiet for a while. That's the typical disclosure
12 or lack of disclosure. But then there was a leak. I believe
13 the leak was in January, 2013, so six months after the process
14 had begun.

15 Once that -- there was a leak, there was inbound
16 commentary to the board. Carl Icahn didn't like the deal,
17 other shareholders didn't like the deal, so there was inbound
18 to the board. But there was nothing outbound. It was all just
19 information coming in.

20 So it's very important to be listening if shareholders
21 make inbound comments, but it's unheard of to make outbound
22 inquiries to or discussions with shareholders, because the
23 concern is you will be giving them things, information, that
24 other shareholders don't have.

25 **Q** I see. And so, if you can continue. So step five, what

1 is step five?

2 (Document displayed)

3 **A** The final -- well, and let's -- at least this process, the
4 final piece would be the negotiation with the special
5 committee. And that's an important piece as well. Because if
6 you think about it, the shareholders wouldn't have access to
7 all the non-public information. So they can't meaningfully
8 say: Is this a good offer or a bad offer?

9 If it's really bad, they'll vote it down. But they don't
10 have the insight about what are the prospects of the company,
11 what's the outlook of the company. All of that the board would
12 have, but the shareholders wouldn't have it.

13 So the special committee has that information. They're
14 the directors of the company, and they will negotiate with that
15 information to get the full value they can get from the CEO or
16 the buyout group.

17 Now, in my data and my research, I find that about
18 20 percent of these proposals fail, because the special
19 committee and management don't reach an agreement. So
20 management offers a certain amount, special committee says no,
21 and the deal goes away.

22 If they agree, there's almost always a bump, meaning the
23 first offer -- in this case it's 420 -- the first offer goes to
24 something higher. And that bump in my data tends to be
25 somewhere between 10 percent and 15 percent on average. But

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1 there is also a bump if the deal gets done. And as I said,
2 20 percent of the time there is no deal at all, because they
3 can't agree on the price term.

4 Q And your basis for that is your data, you said?

5 A (Nods head)

6 Q I know you explained this previously, but what exactly was
7 your data, and how many deals over what period of time?

8 A Well, it's two different datasets. The one that I used in
9 my Harvard article which I mentioned earlier was all MBOs of
10 U.S. public companies announced between 2006 and 2015. So I
11 think it's about 45 of deals -- 45 deals in that sample.

12 And then in connection with my report here, I created a
13 new sample to update it. And that sample was roughly 30 deals
14 between 2010 and 2021. So there's some overlap in the two
15 samples. But I think, collectively, it's about 60 or 65 deals,
16 total.

17 Q And how comprehensive was your dataset, relative to MBOs
18 in general?

19 A It was all MBOs. I believe I had a size threshold of
20 something like \$50 million, but it was a fairly low threshold.
21 So I try to be as comprehensive as possible in my research, and
22 it was basically all MBOs that were economically meaningful.

23 Q So all deals over 50 million, over what period of time?

24 A 2010 to 2021.

25 Q I see.

1 **A** That -- that 50 million could be off by a little bit, but
2 it was a fairly low threshold to try to capture more deals,
3 rather than fewer.

4 **Q** Understood. So, okay. With that in mind, can you please
5 explain how you went ahead and analyzed the Musk proposal?

6 **A** Well, I -- I examined the Musk proposal against this
7 template. And what I found was this proposal was an extreme
8 outlier. At almost every single step along the way, Mr. Musk
9 operated differently from this model.

10 And, I look at it, it's just incomplete. It's
11 preliminary. It's incoherent in certain ways, which I'll get
12 into. It's illusory in certain ways. So compared to the
13 standard template, it's an extreme outlier.

14 **Q** I see. Okay. Do you have, perhaps, another slide you can
15 walk us through that analysis?

16 **A** There's four different places where I want to focus on my
17 assessment of the Musk proposal, and I'll get into --

18 (Document displayed)

19 **MR. PRICE:** Your Honor, at this point, the
20 specifics -- the question asked for a narrative that might go
21 on forever, so I object.

22 **THE COURT:** So you should ask in a question-and-answer
23 format to elicit, rather than having him lecture.

24 **MR. APTON:** Understood, Your Honor.

25

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1 BY MR. APTON

2 Q Professor Subramanian, can you describe your -- or what
3 was your assessment of the Musk proposal?

4 A Well, on each of these different steps, it was very
5 different. It was just a remarkably different process than the
6 typical template.

7 Now, just to be clear, it's not to say that every single
8 deal's the same. There is minor variations from deal to deal.
9 But even those minor variations are just nothing compared to
10 this deal. This was way out there on lots of different
11 dimensions, which I'll get into. These are four of them that I
12 want to flag and discuss in more detail.

13 Q So -- I see. So point one, permitting Musk's Twitter feed
14 was egregious corporate governance. Why is that part of your
15 conclusion?

16 A Well, this is, I think, a -- one of the many extraordinary
17 features of this particular proposal.

18 (Document displayed)

19 A The original thing was approval by the Tesla board in 2013
20 to allow Mr. Musk to use his Twitter feed as way of
21 communicating additional information about Tesla to the
22 shareholders and to the world.

23 Now, this, in itself, is not problematic. Many companies,
24 especially tech companies, say to the CEO: We want you to be
25 tweeting about the company; that's helpful for the business.

1 And it typically involves the CEO saying: Look at our new
2 product, here's what we're doing in the market, this is great,
3 you should buy our products. That's all perfectly fine.

4 But what's really different here is the communication of
5 material non-public information about a management buyout over
6 Twitter. That's just never been done before. And the specific
7 concern is that Mr. Musk could do it at a time that is
8 disruptive to the company. And sure enough, at this time,
9 there was production problems, there was issues with Tesla. So
10 there's a concern. And because of that concern, you'd want the
11 board or the special committee to manage the disclosures, and
12 not the CEO.

13 So just from the get-go, this Twitter feed and making it a
14 way to communicate information, that in itself is not
15 troubling. But what is troubling is material non-public
16 information that is massively important to the market being
17 communicated through this fairly casual channel.

18 (Document displayed)

19 **A** What's further, I think, remarkable about it is that there
20 were no guardrails on the Twitter feed --

21 **MR. PRICE:** I'm going to object. Now we're getting
22 into a long narrative, without questions.

23 **THE COURT:** All right. Why don't you ask the
24 questions.
25

1 **BY MR. APTON**

2 **Q** Professor, is there any other reason for your opinion that
3 the Musk Twitter feed was egregious corporate governance?

4 **A** Well, there is. And as chairmen of a board, we have to be
5 very careful in my company about what gets communicated to the
6 market, and when it goes out there.

7 What's striking to me is that Mr. Gracias, who was the
8 lead independent director, Ms. Denholm, she's another director,
9 they testified that there was overall policies, but no
10 monitoring of Mr. Musk's Twitter feed. No guardrails of any
11 kind.

12 Now, sure enough, because there were no guardrails, there
13 is no indication in the record that anyone reviewed the tweet
14 before Mr. Musk sent it out, "420," "Funding secured," and then
15 the next tweet about the shareholder vote is the only thing
16 standing in the way. So the lack of guardrails is deeply
17 troubling as a matter of corporate governance. And what makes
18 it particularly troubling in this particular case is that
19 Mr. Musk had tweeted just one month prior, in July of 2018,
20 about one of the Thai cave divers being a pedophile.
21 Obviously, that was incredibly disruptive, very problematic for
22 that company --

23 **MR. PRICE:** I object. It's beyond the scope of the
24 question, and irrelevant.

25 **THE COURT:** Overruled.

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1 **THE WITNESS:** And so when that tweet was out there,
2 one would think that as a matter of corporate governance, there
3 would be guardrails imposed to say to Mr. Musk: You have to be
4 more careful, and here's a process by which your tweets can go
5 out, especially about the company. But that wasn't done.

6 **BY MR. APTON**

7 **Q** Professor, before we go on, you mentioned that the Twitter
8 feed was identified as a corporate channel of communication in
9 November of '13, correct?

10 **A** Correct.

11 **Q** Do you recall how that was done?

12 **A** I believe it was done through an 8-K filing, which is
13 basically a filing with the SEC that communicates something
14 current about the company. So there was an 8-K filing in
15 November, 2013, saying Mr. Musk's Twitter feed is a source of
16 additional information about the company.

17 **MR. APTON:** Your Honor, may I show the witness
18 Exhibit 103?

19 **THE COURT:** Okay.

20 (Document displayed)

21 **BY MR. APTON**

22 **Q** And Professor, you could scroll through that, but I just
23 want to see if this is the 8-K to which you are referring.

24 (Witness examines document)

25 **A** It is, yes.

1 Q And do you see, where in this 8-K does it specify
2 Mr. Musk's Twitter as a corporate channel of communication?

3 A I believe it's on the next page. Can I turn -- oh.

4 (Document displayed)

5 A There we go. Okay.

6 Q And if you needs us to zoom in on any --

7 (Document displayed)

8 Q Yeah.

9 A So it says close to the bottom -- can I -- yeah, here we
10 go. Oops.

11 "For additional information, please follow

12 Elon Musk's Tesla Twitter accounts."

13 And you see the accounts listed there.

14 So that, in itself, is not problematic, but to have no
15 guardrails on it to me is very troubling, as a matter of
16 corporate governance.

17 Q Understood.

18 MR. APTON: Your Honor, I would like to move
19 Exhibit 103 into evidence.

20 THE COURT: Any objection?

21 MR. PRICE: No objection.

22 THE COURT: Admitted.

23 (Trial Exhibit 103 received in evidence.)

24 MR. APTON: Thank you.

25

1 BY MR. APTON

2 Q If we could turn back to your slide deck, I believe we
3 were going to discuss a second point in your opinion.

4 (Document displayed)

5 A Well, there's also a second point to this opinion.

6 Q Please, continue. Sorry.

7 A Just, the -- the Twitter feed, no guardrails, one might
8 think as a matter of corporate governance that if there is no
9 guardrails, at least the board would have some kind of rapid
10 response plan. That is to say, if Mr. Musk were to tweet about
11 Thai cave divers being pedophiles or something untrue about the
12 company, there would be a rapid response to that tweet to make
13 sure the market is properly informed. But in this particular
14 case, there was nothing for six days.

15 Six days is a lifetime in this kind of transaction. I
16 think there was hundreds, if not thousands, of news articles
17 published in those six days about the transaction. And to have
18 no rapid response team, no commentary from the board in those
19 six days is, again, quite troubling as a matter of corporate
20 governance.

21 Q And you're referring to "six-day period" as referring to
22 the six days following the "Funding secured" tweet?

23 A Correct. So between August 7th when the "Funding secured"
24 tweet was published, to August 13th when there was the blog
25 post from the company and from Mr. Musk.

1 Q And which, which blog post? The one -- I'm sorry. Did
2 you say the one on the 7th? Or the 13th?

3 A The 13th. That was the response, I think, from the
4 company, or at least was scripted by the company's attorneys to
5 publish about the offer.

6 Q Understood. Okay. Professor, the second point in your
7 analysis was that Musk did not consult the legal or financial
8 advisers. Is that correct?

9 A Yes, correct.

10 Q Okay. Can you elaborate on that point, please?

11 A Well, as I've said earlier, this is a very important part
12 of the process. The bankers will advise you, as the buyout
13 team or buyout person: Here's what we think is a good price;
14 here's how the process is going to play out.

15 They will typically do three kind of analyses. One will
16 be what's called a discounted cash flow analysis, so they'll
17 take the cash flows and give you an evaluation based on that.
18 They'll do a comparable transactions analysis. They'll say
19 here are some comparable deals; let's look at that. They'll do
20 a comparable trading multiple analysis.

21 All that is very important at the outset as part of the
22 initial preparation by the bankers. And none of that was done
23 in this particular situation.

24 (Reporter clarification)

25 **THE WITNESS:** Yes, I'm sorry. I'll do better.

1 There was the discussion with the PIF on July 31st. And
2 then one week later, August 7th, there was the disclosure of
3 the 420 per share. That was seven days.

4 Again, just taking the Dell case as a benchmark, Mr. Dell
5 took seven months from the initial connection to Southeastern
6 to the eventual public disclosure of the offer. So it's
7 remarkably different, incredibly different from the typical
8 deal. The Dell deal is, I think, the best comparison. And
9 even that deal was just nowhere near as quick as this one was.
10 Didn't consult with banker or lawyers.

11 There was one, I think, 30-minute conversation with
12 Mr. Durban from Silver Lake, but that wasn't meant to be
13 substantive. That was just setting up what Mr. Durban called a
14 kickoff meeting that would have happened later.

15 So it's striking how a typical process would require
16 banker and lawyer consultations but none of that was done in
17 this particular case until the "Funding secured" tweet as
18 happening, and even after the 7th there it is not any real
19 meaningful analysis done by the bankers in the way you
20 typically see before a deal is publicly announced.

21 **Q** So just to clarify timeline, Musk, I guess, approached the
22 board. His proposal was made on what day?

23 **A** August 2nd.

24 **Q** And the "Funding secured" tweet was several days later on
25 August 7, correct?

1 **A** August 7, correct.

2 **Q** Okay. And the August 2nd proposal, can you tell us a
3 little about that?

4 **A** Well, that email --

5 **MR. PRICE:** Objection, Your Honor. That calls for a
6 narrative.

7 **THE COURT:** Overruled.

8 **THE WITNESS:** The August 2nd email was the 420
9 proposal to the board. It was just three days after his
10 meeting with the PIF, so very, very short timeline. The 420,
11 which I'll get into in more detail, was just a 20 percent
12 premium over the current market price. That's just a number,
13 that's not the way these things are normally done.

14 And one particular piece that stood out to me in the email
15 was the 30-day what we call a fuse on the deal, meaning it
16 expired after 30 days. That is stunningly short. No deal in
17 my sample has been done in 30 days, it's just not possible. So
18 to put a 30-day fuse on an offer to the board on August 2nd
19 makes it, I think in some ways, just an illusory offer, it's
20 not real.

21 And had he gotten meaningful legal advice or banker advice
22 prior to putting that proposal on the table on August 2nd, he
23 would have been told or would have been able to understand that
24 30 days is just not pretty realistic.

25 **Q** And, I would like --

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1 **MR. APTON:** Can I show the professor Exhibit 81,
2 please?

3 **THE COURT:** You can show it to him.
4 (Document displayed)

5 **MR. APTON:** Your Honor, this Exhibit 81 was the
6 document that was previously showed to the jury during opening
7 statements. May I publish it to the jury and move it into
8 evidence?

9 **MR. PRICE:** There's no objection.

10 **THE COURT:** You may. Admitted.
11 (Trial Exhibit 81 received in evidence.)

12 **BY MR. APTON**

13 **Q** So, Professor, this is the August 2nd proposal to the
14 board, correct?

15 **A** That's right.

16 (Document displayed)

17 **Q** And can you just point out the aspects of the email that
18 you were just discussing, so we see it here and understand?

19 **A** Sure. The 420 is in the header. And I'll come back to
20 that 420 in a few minutes. But there was almost zero analysis
21 that went into that number. It's just not how a price is put
22 on the table. Especially in what would have been a 60 or 70 or
23 \$80 billion MBO, that's just not how it's done.

24 And then I mentioned a minute ago, the offers expires in
25 30 days. Anyone who was well-advised or even partially advised

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1 in a situation like this would know that's just not possible.
2 There needs to be a process. That process will take probably
3 at least three months, but in a deal of this size, probably
4 more like six months or even longer than that.

5 The Dell MBO took, I believe, a year, maybe even 18 months
6 before it went from the initiation to the final closing, so 30
7 days is just impossible. And I know that's a strong word, but
8 it -- I think it's literally impossible to get a deal done of
9 this size in 30 days.

10 **Q** So why do you say it's impossible?

11 **A** Well, there's just so many steps, which I have gone
12 through already. The special committee -- special committee
13 has to be constituted. They've got to hire advisers. There's
14 got to be a negotiation. There's public communications.
15 There's then a shareholder vote. And just that last step of a
16 shareholder vote can take three months, four months. You've
17 got to put out a proxy statement. Lots of thing have to go out
18 to the shareholders.

19 And then, one specific thing this 30 days goes to. In any
20 deal like this, which is a cash deal, you're selling the
21 company for cash, there's an obligation to make sure you get
22 the best price. And what that typically means is having some
23 canvass of the marketplace. Seeing if somebody else can offer
24 more money.

25 For example, in the Dell MBO, there was an offer, I

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1 believe it was thirteen-seventy-five per share. And then there
2 was what's called a go-shop period, 45 days, where the board
3 could go shop for a higher offer. So there would have been
4 some kind of similar process here, either pre-signing or
5 post-signing, where you've got to go and talk to other
6 potential buyers and see if they can offer more. That takes at
7 least 30 days; in the Dell case it took 45 days. So just that
8 step, on its own, would take longer than 30 days.

9 Q I see. And so this is the proposal, August 2nd -- oh, I'm
10 sorry. Is there something --

11 A And I want -- just to make sure I complete my answer to
12 your question, this last sentence I think is also important
13 because what he's envisioning, at least as of August 2nd, is a
14 very novel deal. I think Mr. Durban said it was unprecedented.
15 In a typical MBO, the shareholders get cash in the exit of the
16 company. Mr. Musk was contemplating some version of that in
17 which some shareholders would get cash and exit, but for
18 shareholders who want to continue, they could continue in the
19 private company.

20 That would have been unprecedented. It's a variation of
21 an MBO. But the complexity of that, figuring out how you can
22 do that, would take even more time. So this is a monstrous
23 deal, 80 billion-dollar MBO, and then there's the further
24 complexity of a complicated structure that's never been done
25 before, it would require even more planning, even more

1 preparation, which wasn't that done.

2 Q And so this is on August 2nd. And August 3rd, 4, 5, 6,
3 7 -- five days later he tweets "Funding secured."

4 MR. APTON: Can we show Exhibit 8, please?

5 (Document displayed)

6 BY MR. APTON

7 Q Is this what you would refer to as the public disclosure
8 in your step three process?

9 A Correct. And yes, this is the public disclosure.

10 Q Okay. I believe the next point in your assessment was
11 that Mr. Musk's proposal, his unilateral announcement of the
12 offer was highly unusual. Is that correct?

13 A It is, yes.

14 Q Can you please elaborate on that?

15 A Well, it is what we just saw. The August 7th "Funding
16 secured" tweet was a unilateral disclosure by the CEO from the
17 buy side of a major public company MBO. That's never been done
18 before. Certainly not by Twitter. And as I mentioned in my
19 sample, there was only one other instance, it was a very --
20 well, I shouldn't say very small. It was had a \$400 million
21 MBO. So, less than 1 percent, as large as it still would have
22 been, but it's very unusual. And the risk is that Mr. Musk
23 would time the disclosure at a moment where it's going to
24 disrupt the company.

25 Now, in addition to that generally unique disclosure, it

1 was also done during the trading day and there's testimony from
2 the directors that most companies, my company, Tesla, most
3 companies don't make disclosures during the trading day. That
4 makes it even more disruptive, and that was what was done here.
5 So incredibly, um, different from the usual process. And then
6 it was unusual that the CEO would do it on his own,
7 unilaterally.

8 **Q** Now, Professor, in your second bullet point here you say
9 that beyond funding secured, no details were provided about the
10 source or amount of financing for the going-private
11 transaction. Do you see that?

12 **A** Yes.

13 **Q** And why do you make that point?

14 **A** Well, it's a remarkable disclosure to say "Funding
15 secured" with no indication, at least in the tweet, about where
16 the funding is coming from. Is it fully financed? Is it
17 committed financing? Nothing along those lines.

18 So that would be typical to at least talk to bankers and
19 maybe even have committed financing by the time you announce
20 it, but that wasn't done here.

21 **Q** Now, Professor, there were at least two tweets about the
22 transaction on August 7th, correct?

23 **A** Yes.

24 **MR. APTON:** Can we show Exhibit 13, please?

25 This is already in evidence, Your Honor.

1 (Document displayed)

2 **BY MR. APTON**

3 **Q** Now, this tweet, "Investor support is confirmed. Only
4 reason why this is not certain is that it's contingent on a
5 shareholder vote," did you review this tweet in the course of
6 your analysis?

7 **A** I did, yes.

8 **Q** And you see there that just below there is a link to a
9 blog post?

10 **A** Yes, uh-huh.

11 **Q** Are you familiar with the blog post to which that relates?

12 **A** Yes.

13 **MR. APTON:** Can we show Exhibit 12, please, already in
14 evidence?

15 (Document displayed)

16 **BY MR. APTON**

17 **Q** Is this the blog post that was linked to that "Investor
18 support confirmed" tweet?

19 **A** Yes, I believe it is.

20 **Q** Now, this is certainly longer than the tweets. But did
21 you take this into account when you said that there were no
22 details beyond "Funding secured" provided to the market that
23 day?

24 **A** Yes, I did. I did look at this blog post, and it doesn't
25 have any further details on where the financing is coming from

1 or whether it's committed. It talks about other things, but
2 not about the financing.

3 **Q** And why is that noteworthy, in your opinion?

4 **A** Well, one possibility would be "Funding secured" was the
5 headline. And then this would be in a lot more detail about
6 where the funding is coming from, what are the commitments,
7 what is it conditioned upon. That would be a typical blog
8 post, I suppose, if it's being disclosed as a tweet, but
9 there's nothing along those lines. It talks about Tesla and
10 SpaceX not merging. It talks about shareholders continuing,
11 but it doesn't say anything about the financing at all.

12 **Q** And -- and that -- that is -- in your opinion, is this in
13 line with -- with what a corporation should be disclosing after
14 a tweet such as "Funding secured"?

15 **MR. PRICE:** Objection. That is beyond the scope of
16 his opinion.

17 **MR. APTON:** I'll withdraw the question, Your Honor.

18 **THE COURT:** Okay.

19 **BY MR. APTON**

20 **Q** Professor, let's move on. The next point you made was
21 that Musk's proposal was substantively flawed, correct?

22 **A** Correct.

23 **Q** And why do you say that?

24 (Document displayed)

25 **A** Well, there's at least a few different reasons. One I've

1 already mentioned. In any MBO, especially an MBO of this size,
2 you don't have careful banker analysis. They would do
3 discounted cash flows, they would do comparable transactions.
4 They would give you a range of possible deal pricing. Instead
5 of any of that, Mr. Musk just took the stock price and added
6 20 percent. That's not how pricing gets done in a deal like
7 this.

8 I should also note, and you saw it on the blog post that
9 we just put on the screen, that Mr. Musk seemed to think that
10 that 420 was a first and final offer, and in the blog post it
11 said shareholders will have the choice to keep in the company
12 or take the 420.

13 What he's not describing is there's a whole process
14 involving a negotiation, that 10 to 15 percent bump I mentioned
15 earlier, that has to happen. But he's simply saying: No, take
16 it or leave it, 420, that's the offer to you. Which is just
17 not correct, either.

18 So my data shows there's no standard premium in an MBO.
19 It could be very small, 5 percent, it could be 90 percent.
20 There is no standard premium. But here, Mr. Musk applies this
21 allegedly standard 20 percent. It's just not the way things
22 are done.

23 (Document displayed)

24 **A** This point I already mentioned, I'll just make it very
25 briefly that a first and final offer is just not done. There's

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1 a first offer, there's a negotiation, but that is not what
2 Mr. Musk was describing his August 7 tweet or in his blog post.
3 And then, as I said already, 30 days, it's just not possible.
4 And so it was illusory, I think, for that reason.

5 **Q** I see. And so if you could, I guess, summarize or compare
6 it to the typical MBO process, how did Mr. Musk's proposal
7 compare?

8 **A** Well, this is the process I put up earlier, that standard
9 template.

10 (Document displayed)

11 **A** And this is not to say that every single deal follows this
12 template exactly. There can be some minor variation from deal
13 to deal, but I have never seen in my 23 years studying
14 corporate deals a deal that was so far off the norm as was this
15 Musk proposal.

16 So the initiation, no consultation with bankers or lawyers
17 before the public announcement. The board did form a special
18 committee, so that's the one green check I would give. The
19 board formed a special committee. I think they were in the
20 process of hiring bankers and lawyers, maybe they'd even
21 retained somebody, so that was one piece of the process that
22 was at least closer to the standard template.

23 But then the public disclosure was done unilaterally by
24 the CEO through a tweet. That's unprecedented, not done.

25 There was significant outbound engagement with

1 shareholders. Mr. Musk making the offer public in order to go
2 talk to shareholders, that's also not the norm.

3 And then, this idea that there's going to be no
4 negotiation with the special committee, it's just going to be
5 420, shareholder vote, take it or leave it, it just missed a
6 big process step, a very important process step of negotiation
7 between the special committee and Mr. Musk. That didn't happen
8 here, either.

9 **Q** And with respect to the deal -- I'm sorry. With respect
10 to the Dell MBO that you mentioned previously, how did the Musk
11 proposal compare specifically to the Dell MBO?

12 **A** Well, the Dell MBO --

13 (Document displayed)

14 **A** -- had some process flaws that I've described in my
15 research. But it was basically the standard template. There
16 was a lot of deliberation, Mr. Dell talked to advisers, bankers
17 and lawyers. He spent 60 days before he brought it to the
18 board.

19 In this case, it was two days, from July 31st to
20 August 2nd, from when Mr. Musk had his initial conversation
21 with the PIF to bringing it to the board. Very, very short.

22 As I've already said, lots of consultation in the Dell
23 case with advisers; no consultation here. Mr. Dell did not put
24 a deadline in his offer; Mr. Musk did, 30 days. It just can't
25 be done in 30 days. Mr. Dell expected a negotiation with the

1 special committee, he said I'll condition my offer on special
2 committee approval. No such expectation of negotiation here.
3 To the contrary, Mr. Musk said: I want this to go to the
4 shareholders, and they get to vote, and that's the only thing
5 standing between us and a deal. It's just not correct.

6 Discussion with shareholders. There was inbound to the
7 board in the Dell process, but no outbound. Here, there was
8 outbound. Again, very unusual.

9 A final kind of two points. The timing from the initial
10 presentation to the public disclosure, 150 days in Dell. It
11 was five days here. August 2nd to August 7th, incredibly short
12 timeline.

13 And then the special committee controlled the disclosures
14 in the Dell case, but Mr. Musk was making disclosures
15 unilaterally here.

16 **Q** And in connection with your engagement in this matter,
17 you've reviewed deposition transcripts from the witnesses in
18 this case, correct?

19 **A** Yes.

20 **Q** And you've reviewed emails and internal documents,
21 correct?

22 **A** Yes.

23 **Q** And do you have any understanding of whether Elon actually
24 spoke with Michael Dell before the tweet?

25 **A** I believe he did, correct. So Mr. Musk called Mr. Dell

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1 and spoke to him, I don't know how long. But yes, before the
2 August 7th tweet, that conversation did happen is my
3 recollection.

4 **Q** And I think you mentioned earlier, Elon also spoke with
5 Egon Durban of Silver Lake, who was also involved in the Dell
6 deal. Correct?

7 **A** Correct.

8 **Q** And so he spoke with both those advisers before the tweet?

9 **A** Yes. That's my understanding.

10 **MR. APTON:** And so, Professor, at this point I don't
11 have any further questions.

12 **THE COURT:** All right.

13 **MR. APTON:** I reserve for redirect.

14 **THE COURT:** Thank you.

15 **MR. APTON:** Thank you.

16 **THE COURT:** All right. Thank you.

17 Cross.

18 **CROSS-EXAMINATION**

19 **BY MR. PRICE**

20 **Q** Good morning, Professor Subramanian.

21 **A** Good morning.

22 **Q** So first of all, on your background I understand you are
23 the chairman of a company in the automobile industry. Correct?

24 **A** Correct.

25 **Q** And that company is not Tesla, right?

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1 **A** Correct.

2 **Q** And in your testimony you mentioned that one of your
3 qualifications, one of the things that qualifies you for
4 knowing about how MBOs work, one of the -- maybe it's a small
5 thing, but it was that you were actually an expert in the one
6 management buyout that you kind of used throughout your
7 analysis as being the typical management buyout. Right?

8 **A** I didn't say it was typical. It was the most comparable
9 to this situation because it was so large. So not typical, but
10 comparable to this deal.

11 **Q** I think, as you've told us, you were actually involved as
12 an expert in that. Right?

13 **A** Correct.

14 **MR. PRICE:** By the way, let me make sure everybody has
15 their binders. I don't want to get ahead of myself here.
16 Could we have the binders handed out of the exhibits and the
17 deposition transcript.

18 May I approach, Your Honor?

19 **THE COURT:** Yes.

20 (Document tendered)

21 **MR. PRICE:** Let me check that everything is up there
22 now.

23 **BY MR. PRICE**

24 **Q** So Professor Subramanian, as they are making sure we have
25 everything else in front of you, in addition to what your

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1 counsel gave you, I did give you some exhibits, and I think we
2 are going to start talking about them. So we were talking
3 about how you were involved as an expert in that Dell MBO. And
4 just to give us some context, in that MBO, Mr. Dell and a
5 partner tried to take, and in fact, was successful in taking
6 Dell private, correct?

7 **A** Correct.

8 **Q** They bought out all of the shareholders, is that right?

9 **A** Correct.

10 **Q** And Mr. Dell's percentage in the company increased from
11 about 16 percent to about 75 percent?

12 **A** That sounds about right.

13 **Q** And his partner, Silver Lake, ended up with the remaining
14 25 percent?

15 **A** That sounds right.

16 **Q** Okay. And in connection with that case, you said there
17 was a -- it's called a go-shop period in that case?

18 **A** Correct.

19 **Q** And a price was agreed upon as to what the shareholders
20 should be paid for basically getting them out of the company,
21 right?

22 **A** Yes.

23 **Q** And that go-shop provision was a method of making sure
24 that was a fair price, right?

25 **A** That is generally correct. I had my concerns about

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1 whether that was meaningfully the case in the particular Dell
2 situation.

3 Q So in that case, actually, you represented a group of
4 shareholders who were saying that that go-shop provision, where
5 they kind of did -- you know, made it available for shopping,
6 for auction, to let other people come in and bid, that you
7 represented shareholders saying that that did not result in a
8 fair appraisal of their shares. Is that right?

9 A No, I didn't represent anybody. I was retained by
10 petitioners who were seeking an appraisal of their shares. And
11 I reached the conclusion that the deal process was not
12 sufficient for price discovery. I didn't say whether it was
13 fair value or not, but simply the deal process was deficient in
14 certain ways.

15 Q Let me be clear. The price per share was challenged by
16 what you said were petitioners, correct?

17 A Correct.

18 Q They were shareholders, correct?

19 A Right.

20 Q And you were an expert for that side of the case. Right?

21 A Correct.

22 Q Okay. And in that, you offered an opinion that that the
23 Dell go-shop process was not an effective process to ensure
24 fair value for these shareholders. Right?

25 A Correct. Because of the match rate that Mr. Dell had,

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1 among other things.

2 **Q** And one of the reasons -- you gave your opinion. One of
3 the reasons was you said Michael Dell brought value to that
4 deal so that Dell was worth more with him than without him.
5 Correct?

6 **MR. APTON:** Objection, Your Honor. Relevance. He's
7 already been qualified as an expert. I don't understand
8 what --

9 **MR. PRICE:** Your Honor, he knows being qualified as an
10 expert does not mean you can't cross-examine the witness.

11 **THE COURT:** Overruled. I'll allow some of this.

12 **BY MR. PRICE**

13 **Q** Is that right?

14 **A** Can you repeat the question, please.

15 **Q** Sure. You gave an opinion that one of the reasons the
16 go-shop process did not -- was not an effective process to
17 ensure fair value was that Michael Dell brought private value
18 to the deal. That the company Dell was worth more with him
19 than without him. Correct?

20 **MR. APTON:** Objection, Your Honor. We're not
21 litigating the Dell MBO.

22 **THE COURT:** Well, I understand. I'm going to allow
23 some, for impeachment value. But we're not going to have a
24 trial within a trial.

25 **MR. PRICE:** No, this is very short.

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1 **THE COURT:** Good.

2 **THE WITNESS:** I did do an event study in that report
3 which talked about how Mr. Dell added value to the company, and
4 that would have implications for both the pre-signing and the
5 post-signing process.

6 **BY MR. PRICE**

7 **Q** If you could look -- I think there's -- Exhibit 363 is in
8 front of you. I believe that's your report. And I'm just
9 going to confirm what your opinion was.

10 **MR. PRICE:** This is not to be displayed to the jury,
11 just to counsel and to Professor Subramanian.

12 **MR. APTON:** Your Honor, I don't have a copy of 363
13 from defense counsel.

14 **THE COURT:** I don't, either.

15 **MR. APTON:** I'm not sure it was disclosed, Your Honor.

16 **MR. PRICE:** This is impeachment.

17 (Document tendered)

18 **BY MR. PRICE**

19 **Q** This is to refresh your memory about your opinion. It's
20 363, Page 40, Paragraph 100.

21 (Document displayed to Court and Counsel)

22 **A** You said Paragraph 100?

23 **Q** Yeah, I think it's 363-40, Paragraph 100.

24 **A** Okay.

25 **Q** And your opinion was that Michael Dell brings private

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1 value to the deal --

2 **MR. APTON:** Objection. He is reading the exhibit into
3 the record while it's only being used to --

4 **THE COURT:** You're using it to refresh his
5 recollection. You can't read what's the refreshment document.
6 You can ask him questions.

7 **MR. PRICE:** Let me ask him this.

8 **BY MR. PRICE**

9 **Q** Isn't it correct that your opinion that you gave was
10 that -- that Michael Dell brought private value to the deal,
11 that Dell was worth more with him than without him? Correct?

12 **A** That's correct. And it was based on an event study I had
13 done. When Mr. Dell had unexpectedly left Dell and then
14 unexpectedly joined Dell, you saw the market reaction to that
15 announcement.

16 **Q** All right. And so you gave an opinion based upon -- it
17 was actually two event studies, right?

18 **A** Correct.

19 **MR. APTON:** Objection, Your Honor.

20 **THE COURT:** Overruled.

21 **BY MR. PRICE**

22 **Q** And the reason this is important is that -- just so we
23 understand to evaluate the process -- if Mr. Dell adds value,
24 then it might deter someone else from coming in and bidding,
25 and just bidding the same dollar amount. Right?

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1 **A** It would depend. It's a lot more complicated than what
2 you just said --

3 **Q** Let me ask it this way: As a result of him adding value
4 and opening up this auction, as a result of him adding value,
5 your conclusion was that third-party bidders couldn't come in
6 and simply bid a nickel more because they don't have Michael
7 Dell on their side. Right?

8 **A** This gets into some auction theory, which I will have to
9 take some time to explain. If you want, I can do that.

10 **Q** Well, no; tell you what. Let me see if it refreshes your
11 recollection. Look at that same paragraph, look at the last
12 sentence, you know.

13 Wasn't your opinion that as a result, third-party bidders
14 can't simply bid a nickel more because they don't necessarily
15 have Michael Dell? That was your opinion.

16 **A** I have to explain that, because there's a whole report
17 that goes to that particular sentence.

18 In general, if there's a common-value auction, I can
19 incrementally bid over your bid, and be confident that I'm not
20 overpaying. In this Dell situation, there was a source of
21 private value that Mr. Dell brought to the table. And so if
22 you don't have the commitment from Mr. Dell to work with you,
23 you can't do that incremental bidding as effectively as you
24 might in the common-value situation.

25 **Q** Okay. Okay. Thank you for that.

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1 And -- and your opinion was that -- I'm sorry. Your
2 opinion was based upon the two event studies that you talked
3 about, right? You mentioned that.

4 **A** Yes. I believe that's right.

5 **Q** And your opinion was that those two event studies were,
6 quote, strong evidence that Mr. Dell brings significant value
7 to Dell, Incorporated. Right?

8 **A** I think that is generally correct, yes.

9 **Q** Okay. I mean, not just -- those events studies weren't
10 just sufficient to show that they were strong evidence that
11 Mr. Dell had value, right?

12 **A** Yes. I don't think it was too much of a claim to say that
13 Mr. Dell adds value to Dell, Inc.

14 **Q** Okay. And the Supreme Court of Delaware rejected that
15 opinion, saying that your conclusions were incorrect. Right?

16 **A** No, that's totally wrong.

17 **Q** Well, looking at the two event studies that you used to
18 support your opinion that that was strong evidence that
19 Mr. Dell brought value, I would like you to look at
20 Exhibit 364.

21 **THE COURT:** 364?

22 **MR. PRICE:** Yes. Do you have that in front of you?

23 **THE COURT:** It's not in my binder.

24 **MR. APTON:** Your Honor, we don't have a copy of that.
25 I'm not sure it was disclosed.

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1 **BY MR. PRICE**

2 **Q** Professor Subramanian, do you have a copy?

3 **A** Yes.

4 **Q** Okay.

5 (Document handed up to the Court)

6 **MR. APTON:** Your Honor, I object to this line of
7 questions. This goes to qualifications. We are way past any
8 semblance of relevance.

9 **THE COURT:** Overruled. But, again, we're not going to
10 do a full mini-trial into this, so --

11 **MR. PRICE:** No. This will be two more minutes.

12 **BY MR. PRICE**

13 **Q** And you've seen the Supreme Court's opinion that discusses
14 your opinion, right?

15 **A** Yes.

16 **Q** And this is a copy of that, correct?

17 **A** Correct.

18 **Q** And this is a -- the Supreme Court of Delaware, there are
19 four justices and one judge who took part in this opinion.
20 Right?

21 **A** It's five justices.

22 **Q** Right. Well, they had a judge sitting by designation in
23 this case, right?

24 **A** I did not know that. Okay.

25 **Q** So there are five of them. And they concluded, did they

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1 not -- and this is at 364-20 -- that (As read):

2 "Stale..."

3 **MR. APTON:** Objection. He is reading into the record
4 again, Your Honor, and it was only being used to refresh
5 recollection.

6 **THE COURT:** Sustained.

7 **MR. PRICE:** This is not meant to refresh recollection.

8 **BY MR. PRICE**

9 **Q** I asked you, isn't it true that the Supreme Court of
10 Delaware rejected the opinion you gave in the Dell case, that
11 your event studies were strong evidence that Mr. Dell added
12 value. Isn't that true?

13 **A** No.

14 **Q** If you would look at 364-20.

15 (Document displayed)

16 **Q** And this opinion by the Delaware Supreme Court, isn't it
17 correct that they concluded that (As read):

18 "Stale event studies and a single self-serving
19 email from Mr. Dell suggesting that a potential
20 customer might not engage the company if he were
21 replaced do not amount to sufficient evidence of
22 Mr. Dell's actual value."

23 That was the Supreme Court's conclusion. Correct?

24 **A** I read the sentence on the page. I -- I don't know what
25 to say about that. It's hard to explain why Mr. Dell does not

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1 add value to Dell, Inc., but you see the sentence on the page
2 as written.

3 **Q** Right. So those five justices -- or, I'm sorry, four
4 justices and one judge looked at your opinion that those
5 stale -- sorry, that those event studies -- and you also
6 mentioned an email from Mr. Dell in your opinion as well,
7 right?

8 **A** It's an email from Mr. Dell.

9 **Q** Right.

10 **A** I don't know if I cited it in my report.

11 **Q** And they concluded that your opinion was wrong. That, in
12 fact, those event studies were stale, and that they did not
13 amount to even sufficient evidence that Mr. Dell had value,
14 right?

15 **MR. APTON:** Objection, Your Honor. There is no event
16 study in this case. This is not relevant.

17 **THE COURT:** It's not -- it's not about an event study
18 in this case, it's about his stated methodology regarding going
19 forward, and so it's fair subject to cross-examination.

20 But again, we're not going to do a mini trial about this.
21 So --

22 **MR. PRICE:** Right. This is the end of this, if we
23 just get that acknowledgment from Professor Subramanian about
24 the Delaware Supreme Court rejecting his opinion in the very
25 case that you were using as a good example to compare this case

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1 to.

2 **THE WITNESS:** What's the question?

3 **BY MR. PRICE**

4 **Q** You now acknowledge, having seen this, that the Delaware
5 Supreme Court rejected your opinion that the event studies and
6 an email from Mr. Dell was strong evidence that Mr. Dell added
7 value. In fact, they said it wasn't sufficient evidence.
8 Right?

9 **A** First of all, the chancery court very much agreed with my
10 study, so that is a separate point. My overall point that was
11 relevant for my deal process analysis is that Mr. Dell had some
12 value to Dell, Inc. That seems, I think, like a really
13 straightforward point that Mr. Dell would have value to Dell,
14 Inc., just like Mr. Musk has value to Tesla. They say the
15 event studies didn't show it; I respectfully disagree.

16 But regardless, as a matter of deal process, to the extent
17 that Mr. Dell had value to Dell, Inc., that would have
18 implications for the deal process which I think are standard in
19 terms of auction theory.

20 **Q** And in fact, the Delaware Supreme Court rejected the
21 petition by the shareholders that you were testifying for to
22 change the price of the deal. Right?

23 **A** My recollection is the deal price was thirteen-eighty-two.
24 The chancery court awarded seventeen-sixty-five. And then, as
25 you say, the Delaware Supreme Court reversed, as a matter of

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1 law, and said that the deal price should be considered the best
2 evidence of fair value.

3 **Q** Well, wait. One of the reasons they reversed is because
4 they rejected your opinion that these event studies were strong
5 evidence that Mr. Dell added value. Right?

6 **A** I disagree. I think it was a much broader analysis than
7 what you just said. And it had to do with what does it take to
8 be sufficient as a matter of deal process. And that's a matter
9 of appraisal doctrine in Delaware. My deal process analysis, I
10 think, is a matter of economics.

11 **Q** Well, let's talk about, then, your use of your expertise
12 in this case. And let's start with, I guess, one -- I think it
13 was your fourth slide where you say you did an assessment of
14 Mr. Musk's -- you call "MBO proposal." Do you recall that?

15 **A** Yes.

16 **Q** And in your report, you actually defined, have a
17 definition of what you mean by "MBO proposal." Right?

18 **A** I believe that's right, yes.

19 (Off-the-Record discussion between counsel)

20 **MR. PRICE:** Your Honor, if I may place before the
21 witness and give to counsel and the Court a copy of Professor
22 Subramanian's report in this case?

23 **THE COURT:** All right.

24 (Document tendered)

25 **MR. APTON:** Thanks.

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1 **BY MR. PRICE**

2 **Q** And in your report, you define the proposal at
3 Paragraph 25. Is that right?

4 **A** Correct. I'm using the defined term "Musk Proposal" to
5 refer to the August 7th two tweets.

6 **Q** Okay.

7 **MR. PRICE:** Just one second, Your Honor.

8 **BY MR. PRICE**

9 **Q** That is a capitalized term, "Musk Proposal," correct?

10 **A** Correct.

11 **MR. APTON:** Excuse me, Bill. This is the wrong
12 report, I believe.

13 (Off-the-Record discussion between counsel)

14 **BY MR. PRICE**

15 **Q** Just to make sure, did you have a copy of your original
16 report in this case?

17 **A** I think that is what you just gave me?

18 **Q** Dated November 8, 2021. Do you have that in front of you?

19 **A** I think you just gave it to me.

20 **Q** I want to make sure it is the right one, and not the
21 rebuttal.

22 **A** It's the first report.

23 **Q** Okay. And so this capital "Musk Proposal" that you
24 define, you define as being only some of the August 7th tweets.
25 Right?

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1 **A** You said "Some of the August 7th tweets"?

2 **Q** Yes.

3 **A** I believe there was two August 7th tweets, and it refers
4 to both of them collectively.

5 **Q** And what you refer to here is what's been identified into
6 evidence in this case Exhibit 8, which is the August 7th tweet
7 at 12:48 p.m.

8 **MR. PRICE:** If we could put Exhibit 8 up.

9 (Document displayed)

10 **BY MR. PRICE**

11 **Q** Do you see Exhibit 8, sir?

12 **A** Yes. And if I could just clarify my earlier answer, it
13 also refers to the blog post on August 7th, so I believe that
14 "Musk Proposal" refers to the two tweets and the blog post.

15 **Q** Let's look at those. There was the August -- this tweet,
16 Exhibit 8. Exhibit 12.

17 (Document displayed)

18 **Q** Did it refer to this? Is that part of the Musk proposal?

19 **A** Yes, because it's referred to as the "email blog post" in
20 Paragraph 25 of my report.

21 **Q** And then Exhibit 13.

22 (Document displayed)

23 **Q** This is also part of the blog post, right?

24 **A** I'm sorry. You said as part of the blog post?

25 **Q** I'm sorry. This is also one of the things that you

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1 considered in -- in defining what the Musk Proposal (Indicating
2 quotation marks) was, right?

3 **A** Correct.

4 **Q** And your conclusion was that there were only two terms to
5 what you a defined as the Musk Proposal (Indicating quotation
6 marks). And that is "420" and "Funding secured." Correct?

7 **A** Where do you see that?

8 **Q** I'm referring to your testimony, but I'm just asking you
9 whether or not that's true. And then we'll see if that's the
10 testimony.

11 **A** I'm not sure I understand your question. There are only
12 two terms to the Musk proposal? There's what's on the screen,
13 that it's contingent only on a shareholder vote. That's part
14 of the proposal as well.

15 **Q** Well, I'm asking, for purposes of your analysis, what you
16 considered to be the terms of the Musk Proposal, you know, for
17 your analysis. Right? And isn't it true --

18 **THE COURT:** So you're asking him now, not what he said
19 in the report. Let's clarify what you're asking.

20 **MR. PRICE:** Yes, yes.

21 **THE COURT:** Okay.

22 **MR. PRICE:** The report simply identifies the tweets.
23 And the blog post, Your Honor; I'm sorry.

24 **BY MR. PRICE**

25 **Q** But is it true that you thought the only relevant terms of

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1 the Musk Proposal was "420 per share" and "Funding secured"?
2 Those are the two terms that are part of the Musk Proposal. Is
3 that correct?

4 **A** Is that in my report? I don't think that's correct, no.

5 **THE COURT:** Well, now you've asked a different
6 question. Now you're asking -- first you asked if these were
7 the only two terms. Now you've asked are these two only two
8 relevant terms. So I think you --

9 **MR. PRICE:** I'll change it.

10 **THE COURT:** -- need to clarify.

11 **MR. PRICE:** Sure.

12 **BY MR. PRICE**

13 **Q** Was it your belief that the only two relevant terms for
14 the, quote, Musk Proposal were "420 per share" and "Funding
15 secured"?

16 **A** The proposal is the 420 tweet. There's this tweet.
17 There's the blog post on August 7th. That's all the proposal.
18 There's also the prior discussions with Silver Lake. It's all
19 the part of the overall process that I examined. This defined
20 term, "Musk Proposal," refers to the two tweets and the blog
21 post on August 7th.

22 **Q** Okay. Let me just read into, if I can, Page 56 from your
23 deposition, Lines 7 through 20.

24 **THE COURT:** Okay, hold on.

25 **MR. PRICE:** Yep.

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1 **THE COURT:** Give me the page again.

2 **MR. PRICE:** This is Page 56, Your Honor, Lines 7
3 through 20.

4 **BY MR. PRICE**

5 **Q** (As read)

6 **"QUESTION:** What are you assuming are the
7 relevant terms of the Musk proposal to the
8 extent they are disclosed?

9 **"ANSWER:** I think the Musk Proposal as I use
10 it is defined in this Paragraph 25, as you
11 say, what are the relevant terms? I think
12 it's the content of the tweets, so '420 per
13 share' and 'funding is secured.' These are
14 the terms that are part of the Musk
15 proposal."

16 And you go on to say (As read):

17 "I think one of the key points in my report
18 is that there is nothing else of substance in
19 the Musk Proposal. And even the two things
20 that are specified are either not correct or
21 not based on any analysis or both."

22 Is that correct?

23 **A** That's what it says, correct.

24 **Q** And, in fact, there were three other tweets that came out
25 on August 7th that actually described Mr. Musk's proposal.

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1 Right?

2 **A** Three other tweets on August 7th?

3 **Q** Yes.

4 **A** From Mr. Musk?

5 **Q** Yes.

6 **A** I know there's the "Funding secured" tweet, there's the
7 "Investor support is confirmed" tweet, and there's the blog
8 post. What are the other tweets you're talking about?

9 **Q** Well, do you have Exhibit 9 in front of you?

10 **A** Is that in the binder?

11 **Q** I have been told that it is.

12 **THE COURT:** That's in the binder.

13 (Witness examines document)

14 **THE WITNESS:** Okay.

15 **BY MR. PRICE**

16 **Q** And you see --

17 **MR. PRICE:** And, Your Honor, actually, we move
18 Exhibit 9 into evidence.

19 **THE COURT:** Any objection?

20 **MR. APTON:** No objection, Your Honor.

21 **THE COURT:** All right, 9's admitted. It can be
22 published.

23 (Trial Exhibit 9 received in evidence.)

24 (Document displayed)

25

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1 **BY MR. PRICE**

2 **Q** And so part of what Mr. Musk told the public was "I don't
3 have a controlling vote now..."

4 **MR. PRICE:** It just disappeared. You have something
5 else up here.

6 (Document displayed)

7 **BY MR. PRICE**

8 **Q** "...& wouldn't expect any shareholder to have one if we go
9 private. I won't be selling in either scenario."

10 This was part of the tweets he put out on August 7,
11 correct?

12 **A** Correct.

13 **Q** You did not consider that as part of the Musk Proposal,
14 correct?

15 **A** It's not part of my defined term as I specified in
16 Paragraph 25. It is possible that I reviewed this tweet as
17 part of my overall analysis.

18 **Q** All right. Throughout your report, when you say "These
19 are my conclusions" about the defined term Musk Proposal
20 (Indicating quotation marks), you are not including this tweet.
21 Right?

22 **A** No, I think my assignment was broader than just those two
23 tweets. My assignment was the Musk Proposal, as we defined it,
24 but also the accompanying disclosures. So it would include the
25 tweet you just mentioned, and also the process before

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1 August 7th as well.

2 Q All right. Well, you defined in your report "Musk
3 Proposal," right?

4 A Correct, as being the two tweets and the blog post.

5 Q And then throughout your report you said: Here are my
6 conclusions about the Musk Proposal. Correct?

7 A Should I read it to you from my report?

8 Q Well, let me withdraw that, and ask you about some more
9 tweets.

10 A I can respond quickly, if you don't --

11 THE COURT: Yeah. Why don't you go look at it,
12 clarify.

13 MR. PRICE: Actually, Your Honor, I'll withdraw that
14 and get back to it, and get these other tweets up first.

15 BY MR. PRICE

16 Q I'd like --

17 THE COURT: That question is withdrawn.

18 BY MR. PRICE

19 Q -- you to look at Exhibit 10.

20 (Reporter clarification)

21 THE COURT: The question -- the question is withdrawn.

22 MR. PRICE: Yeah.

23 BY MR. PRICE

24 Q I'd like you to look at Exhibit 10. That's another tweet
25 that came out on August 7th, correct?

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1 **A** Yes, it is.

2 **MR. PRICE:** Move Exhibit 10 into evidence, Your Honor.

3 **THE COURT:** Any objection?

4 **MR. APTON:** No objection, Your Honor.

5 **THE COURT:** Admitted.

6 (Trial Exhibit 10 received in evidence.)

7 **THE COURT:** You may publish.

8 **MR. PRICE:** Thank you.

9 (Document displayed)

10 **BY MR. PRICE**

11 **Q** And this is (As read):

12 "My hope is all current investors remain with
13 Tesla even if we're private. Would create
14 special purpose fund enabling anyone to stay
15 with Tesla. Already do this with Fidelity's
16 SpaceX investment."

17 This was part of his proposal that was sent out to the
18 public. Correct?

19 **A** Are you saying it's part of my definition of "Musk
20 Proposal"? Or it's a tweet that went out on August 7th?

21 **Q** That's -- that's a good question. If you're going to
22 fairly characterize Mr. Musk's proposal so that you can analyze
23 it, you would include this as part of his proposal. Right?

24 **A** It's not formally part of my definition as I put it in
25 Paragraph 25, but I do remember reviewing this tweet as part of

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1 the overall process.

2 It doesn't add anything to my analysis. If anything, it
3 makes my analysis more problematic, because this is an
4 extraordinary structure he's proposing which has never been
5 done before.

6 (Reporter clarification)

7 **THE WITNESS:** I am sorry. I will do better. I am
8 sorry.

9 **MR. PRICE:** And then if we see Exhibit 11, if we can
10 look at that, sir.

11 (Document displayed)

12 **BY MR. PRICE**

13 **Q** And you see -- do you see this tweet in front of you?

14 **A** Yes.

15 **Q** Also August 7th, right?

16 **A** Correct.

17 **MR. PRICE:** Move Exhibit 11 into evidence, Your Honor.

18 **THE COURT:** Any objection?

19 **MR. APTON:** No objection, Your Honor.

20 **THE COURT:** Admitted.

21 (Trial Exhibit 11 received in evidence.)

22 **THE COURT:** You can publish.

23 **MR. PRICE:** Thank you.

24 (Document displayed)

25

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1 **BY MR. PRICE**

2 **Q** And this is Mr. Musk explaining (As read):

3 "Shareholders could either to sell at 420 or
4 hold shares and go private."

5 Do you see that, that that -- that was part of what he was
6 proposing. Right?

7 **A** Correct. And it's deeply problematic.

8 **Q** And sir, is it correct that for your analysis of what
9 Mr. Musk was proposing in your report, that you aren't
10 including the term that the structure would be that the
11 shareholders could have a choice of rolling over or not?

12 **A** I don't understand your question. Could you repeat it, or
13 clarify?

14 **Q** Sure. When you reference the Musk Proposal throughout
15 your report, are you assuming that one of the terms is that the
16 structure would be that the shareholders could have a choice of
17 rolling over or not?

18 **A** I think the answer is yes, I am considering that factor.
19 And I mentioned earlier that because of that feature of what
20 Mr. Musk was envisioning, it would require even more process.
21 This is not a typical MBO; it's an MBO with a really
22 unprecedented twist, I think as Mr. Durban put it,
23 unprecedented to do it this way as is being shown on the
24 screen.

25 So, yes, it was part of my overall analysis.

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1 Q Well, so let me ask you about that. You referred to
2 Mr. Durban, you referred to him during your direct. That's
3 Mr. Egon Durban, correct?

4 A Yes.

5 Q Yes? And he is with Silver Lake, correct?

6 A Correct.

7 Q And he was an adviser in the Dell MBO, correct?

8 A And the buyout partner in Dell, yes.

9 Q And you said that you credit what he says about this being
10 unprecedented, in part because of the experience he had with
11 Dell. Correct?

12 A I credit his comment that it was unprecedented. I don't
13 know. He's a very experienced banker. He said it was
14 unprecedented. I agree with that assessment. I think it's
15 part of my overall analysis.

16 Q Okay. However, you aren't giving an opinion that the
17 structure that Mr. Musk proposed was not feasible. You're not
18 giving that opinion, are you?

19 A I think that's correct. I'm not giving that opinion.

20 Q Okay. And with respect to unprecedented, there are a lot
21 of financial tractions -- I'm sorry -- financial transactions
22 that are unprecedented until they're first done. Correct?

23 A I think that's tautologically true.

24 Q Yeah. I mean, like a poison pill. That's part of mergers
25 and acquisitions, right? A colorful name?

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1 **A** What's the question?

2 **Q** Yeah. Before it was done, it was unprecedented. Right?

3 **A** Well, actually, that's a good example. It was not
4 unprecedented. There was lots of predecessors to the poison
5 pill before it was put in the *Moran* situation in '84. There
6 was precedent for it. It wasn't just out of the blue. There
7 was things that happened before that, that were similar.

8 **Q** Well, in connection with Mr. Musk and Tesla and SpaceX
9 prior to August 7th, it's true that Mr. Musk had done many
10 things that were previously unprecedented. Correct?

11 **A** I don't know. He's an extraordinary businessperson. I
12 don't know if it was unprecedented, or just really successful,
13 or some combination of both.

14 **Q** And since you were kind of relying on Mr. Durban saying
15 this was unprecedented, you did review his -- his testimony,
16 right?

17 **A** It's possible I did. I don't recall, though.

18 **Q** Well, before giving opinions, you wanted to do all the
19 work that you thought was necessary in order to give an
20 informed opinion, right?

21 **A** Correct.

22 **Q** And there were a number of depositions which in your
23 report you say were reviewed. Right?

24 **A** Should I look and see if I reviewed Mr. Durban's
25 deposition?

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1 Q Sure. Let's go to -- well, actually, is it correct that
2 you skimmed Mr. Durban's deposition?

3 A So it looks like it is in my list of documents that I
4 relied upon. So either myself or my research assistants would
5 have reviewed it in some way to identify the aspects of his
6 testimony that would be relevant for my overall assessment.

7 Q And you mentioned that your research assistants reviewed
8 depositions, correct?

9 A In some cases. In some cases, I review them myself.

10 Q And certainly, as of the time of your deposition, the only
11 depositions that you recall skimming were Mr. Durban and
12 Mr. Musk. Correct?

13 A That sounds possible. I don't recall.

14 Q Okay. And you don't recall skimming any of these other
15 depositions that are listed in your report, do you?

16 A I wrote this report in November, 2021. You are asking me
17 today, do I remember whether I skimmed or reviewed these other
18 depositions? I don't know.

19 Q Well, in fact, your practice in this case was not to
20 actually read each deposition that's cited in your report.
21 Right?

22 That wasn't your practice?

23 A It would depend on how relevant it looked for my overall
24 assessment.

25 Q And so if you only skimmed Mr. Musk and Mr. Durban, is

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1 that because you thought those were the only two relevant ones?

2 **A** Certainly, they would be important. Mr. Musk is obviously
3 central here. And Mr. Durban was a well-known investment
4 banker who did talk to Mr. Musk before August 7th. So I think
5 it is probably right that they were important depositions to be
6 reviewed.

7 **Q** And in reviewing Mr. Durban's deposition, either you or
8 your research assistant, you, of course, found that he said
9 that this concept of having a -- a transaction where
10 shareholders had the choice to stay or to get bought out, you
11 know, with the hope that they would stay, that he concluded
12 that this was actually -- that it worked structurally and
13 legally. You were aware of that.

14 **A** It worked structurally and legally?

15 **Q** It would work structurally and legally.

16 **A** Mr. Durban gave that opinion?

17 **Q** Excuse me. Did you -- are you aware of what's in his
18 deposition?

19 **A** Well, I'm just surprised in part because Mr. Durban's not
20 an attorney. So to give a legal opinion would be, I think, out
21 of his scope of expertise.

22 **Q** And out of the scope of yours.

23 **A** I'm an attorney. But you're right, this is a very novel
24 kind of transaction, so I'd have to do a lot of research before
25 I could figure out whether this is feasible or not.

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1 Q Let me put it this way. If you're going to tell the jury
2 as you did in your direct examination that Mr. Durban said this
3 was unprecedented, in order to give a fair picture of what he
4 said, you would also want to tell them he said however he
5 looked at it, and this was actually structurally and legally --
6 actually, structurally and legally, this worked.

7 A Is that a quote? I'm surprised he would say that. It's
8 outside his scope of -- legal opinion from a banker is just not
9 something that's normally done, especially in an \$80 billion
10 MBO.

11 Q You don't -- sitting here today, don't even recall one way
12 or the other whether he said that, do you?

13 A I'd be happy to review his testimony if you want to show
14 it to me. I'm just surprised that a banker would make a legal
15 opinion in an \$80 billion MBO.

16 Q Okay. Well, one of the -- by the way, you understand that
17 Mr. Durban -- I mean, you're aware that he is scheduled to
18 testify here. Correct?

19 A I don't know.

20 Q Okay. You have been in cases, have you not, where you
21 have, like, sat in the audience as an expert and observed
22 individuals testify, and then take that into account in -- in
23 your testimony.

24 A That sounds possible, yes. I don't recall a specific
25 instance, but that sounds possible.

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1 Q And you don't have the benefit of Mr. Durban's trial
2 testimony in this case, because you're being called before him.
3 Right?

4 A Correct.

5 Q Okay. Now, another person that's involved in this case is
6 a Mr. Daniel Dees from Goldman Sachs, correct?

7 A He was involved in the discussions. I don't know if he's
8 testifying in the case. But he was certainly from Goldman, and
9 involved.

10 Q And he's someone that worked with Mr. Musk in connection
11 with his proposal. Right?

12 A You said "worked with Mr. Musk." My recollection is there
13 was a very brief period sometime after August 7th where Goldman
14 and Mr. Dees were involved, but it obviously finished very soon
15 after that. So "involved" seems like an overstatement.

16 Q Well, do you know the extent of his involvement?

17 A I know it was very brief temporally. Nothing much beyond
18 that.

19 Q Okay. Do you know whether he did any reports?

20 A I believe there was some internal analysis at Goldman,
21 again, after August 7th.

22 Q And to your understanding, he was the co-head of Goldman
23 Sachs' investment banking division?

24 A Over all?

25 Q Yes.

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1 **A** That's not my recollection, but it's possible.

2 **Q** Did you -- did you know he'd been working there for 30
3 years?

4 **A** That sounds very possible. I don't recall. He's a senior
5 guy at Goldman.

6 **Q** Okay. And if you look at your report, you see on 360-58,
7 there's a -- in terms of items you relied on, it says there is
8 a deposition transcript of Daniel Dees, correct?

9 **A** Correct.

10 **Q** Okay. Now, you can't tell us one way or the other whether
11 you actually read that deposition, correct?

12 **A** This was now more than a year ago, so that's correct. I
13 don't recall.

14 **Q** Well, even beyond that, the fact that it's written in your
15 report as a deposition that was reviewed, that was relied upon,
16 even that doesn't tell you will whether or not you actually
17 read it. Right?

18 **A** My general approach is to delegate to research assistants,
19 just as I delegate certain things in my academic articles. And
20 it's possible that I reviewed it, myself, or delegated to an
21 assistant.

22 **Q** Well, but you would tell your assistant what to look for.
23 Right?

24 **A** It would depend on the process and the specific report.

25 **Q** It would certainly be unfair for an expert who claims to

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1 be an objective expert to ask an assistant only to find
2 evidence that would support an opinion to favor the person
3 that's retained you. Right?

4 **A** I think that's right.

5 **Q** Yeah. And so are you aware that Mr. Dees from Goldman
6 Sachs said that he told Mr. Musk on August 8th that the
7 structure and rationale that Mr. Musk offered for what he was
8 proposing made perfect sense?

9 **A** What is this coming from? This is from the Dees
10 deposition? I see something on the screen. What is it from?

11 **Q** That's from the Dees deposition.

12 **A** You say "The structure and rationale make perfect sense."
13 And this is an email from Mr. Dees to Mr. Musk?

14 **Q** I'm sorry. You are not aware of that? Sitting here --
15 you sat here and told the jury this was an illusory offer.
16 That it made no sense. That you had questions about whether it
17 would work.

18 And you don't know whether or not Mr. Dees at Goldman
19 Sachs, co-head of investment banking, said on August 8th that
20 the structure and rationale that Mr. Musk described in his
21 tweets make perfect sense.

22 You're not aware of that?

23 **A** This is one line out of a deposition. It's possible that
24 I reviewed it. I can parse it, if you want.

25 So the rationale makes perfect sense. That seems

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1 possible. This is a going-private transaction. Mr. Musk has
2 talked repeatedly about the benefits of Tesla being a private
3 company. So the rationale is something separate from what I'm
4 talking about.

5 The structure probably goes to this idea of the
6 shareholders continuing in the private company. To me, for a
7 banker to be providing that as a legal opinion and saying it
8 makes perfect sense makes no sense to me.

9 Q I want to understand -- well, strike that.

10 You were in court yesterday when Mr. Littleton testified.
11 Right?

12 A It was two days ago.

13 Q Two days ago. And you heard him testify -- well, first of
14 all, you heard him testify that he had been following Tesla for
15 quite a while. Correct?

16 A I think I sat in on the very end of his testimony. I
17 didn't sit in on the whole thing, but that sounds possible.

18 Q And do you recall him testifying that based upon, you
19 know, his experience following Tesla, that he in fact thought
20 there were compelling reasons for Mr. Musk to want to take
21 Tesla private?

22 Do you recall him saying that, yes or no?

23 A No.

24 Q Okay. And you've testified about saying that Mr. Musk did
25 not follow typical steps of coming up with an amount he was

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1 going to propose for taking Tesla private; that he didn't
2 interact with advisers as frequently or as often prior to
3 making the announcement as you would have thought typical.

4 I want to make sure. Are you testifying that by
5 August 2nd, 2018, when Mr. Musk made his proposal to the board,
6 are you giving the opinion that he did not at that time really
7 intend to make an offer to take Tesla private?

8 Are you giving that opinion to that jury, this jury,
9 today?

10 **A** I think your question is asking whether I knew what was in
11 Mr. Musk's head on August 2nd. And the answer is no, I do not
12 know what was in his head on August 2nd.

13 **Q** Right. And so all this testimony you gave about how 420
14 was flawed because he added 20 percent to the existing price to
15 come up with that, or that there were only a couple of days
16 between his July 31st meeting with the PIF and making the
17 proposal to the board, none of that is meant to suggest that
18 you have an opinion that he wasn't, in his mind, making a
19 genuine proposal to the board to try to take Tesla private.
20 Correct?

21 **A** I think that's the same question which I've already
22 answered. I don't know what was in his head on August 2nd.
23 That is correct.

24 **Q.** And so -- strike that.

25 And when we -- and so one of the slides you put up is that

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1 Mr. Musk did not consult with legal or financial advisors
2 before making his proposal; correct?

3 A. Correct.

4 Q. And that he spent extraordinarily little time between his
5 initial consultation with the PIF and his public disclosure of
6 the offer; correct?

7 A. Correct.

8 Q. Now, you know that one of the key issues in this case is
9 whether or not Mr. Musk made material misrepresentations to the
10 public; correct?

11 A. Yes. That sounds broadly correct, but I'm not expressing
12 any legal opinions in this case.

13 Q. And you're not giving an opinion as to whether or not any
14 tweet or statement Mr. Musk made was material; correct? You're
15 not giving an opinion on that?

16 A. Correct.

17 Q. And it's fair to say that whether Mr. Musk spent, you
18 know, two days deciding he wanted to take Tesla private or five
19 months or a year, you know, doesn't go to the question of
20 whether or not any statements he made to the public that were
21 inaccurate, you know, were material to the public; right? It
22 has nothing to do with that?

23 A. I don't know. That sounds like a question of relevance
24 for the jury to decide. I just don't know.

25 Q. Well, certainly you have it in your report, said that that

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1 -- that what you were testifying here about spending little
2 time between initial consultation and then buyout partner
3 that -- that that has any relevance as to whether or not
4 Mr. Musk made representations, inaccurate representations, that
5 were material; right? Doesn't go to that issue, does it?

6 **A.** Okay.

7 **THE COURT:** Counsel, I think you are asking him for a
8 legal conclusion. You already asked him whether he has an
9 opinion, and he said no, that wasn't within the scope of his
10 report, I believe. Unless it was, then you can bring that out.

11 **MR. PRICE:** It wasn't.

12 **THE COURT:** Okay. I don't know if there is a
13 convenient breaking point.

14 **MR. PRICE:** That's a good indication.

15 **THE COURT:** Well, we're approaching the hour. We can
16 go another five minutes or something.

17 **MR. PRICE:** This is fine, Your Honor.

18 **THE COURT:** All right. We'll go ahead and take our
19 20-minute break at this point. We'll see you in 20 minutes.

20 **THE CLERK:** All rise for the jury.

21 (Jury exits the courtroom at 11:56 a.m.)

22 **THE COURT:** Just looking at the clock, how much longer
23 do you think?

24 **MR. PRICE:** I'm hoping half an hour.

25 **THE COURT:** All right. And then sometime on redirect?

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1 **MR. APTON:** I don't know what's coming down the pike,
2 but 15 minutes?

3 **THE COURT:** All right. Then we'll get to the next
4 witness today?

5 **MR. PORRITT:** Yes, Your Honor. I hope so. That will
6 be Mr. Musk.

7 **THE COURT:** Okay. How long are we expecting your
8 direct or your cross?

9 **MR. PORRITT:** I mean, over -- between an hour and two
10 hours I would anticipate.

11 **THE COURT:** So kind of spill over until Monday.

12 **MR. PORRITT:** He's going to spill over until Monday
13 for sure.

14 **THE COURT:** Thank you.

15 **THE CLERK:** Court is in recess.

16 (Whereupon there was a recess in the proceedings
17 from 11:57 a.m. until 12:20 p.m.)

18 (Proceedings held outside the presence of the jury.)

19 **THE CLERK:** Court is reconvened.

20 **MR. SPIRO:** Your Honor, briefly.

21 **THE COURT:** Yes.

22 **MR. SPIRO:** Mr. Porritt and I conferred quickly, and
23 we worked out any issues that could arise with the next witness
24 so that if the Court wants, we can just call the next witness
25 so that the Court -- we don't have to break. Because there

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1 were a couple of unsettled issues from this morning, but
2 Mr. Porritt and I worked it out. So you don't have to look at
3 me to take a break or anything before the next witness.

4 **THE COURT:** Good. All right. Thank you.

5 (Jury enters the courtroom at 12:27 p.m.)

6 **THE COURT:** All right. Have a seat everyone. Welcome
7 back ladies and gentlemen, members of the jury. We're going to
8 pick up with cross examination.

9 **BY MR. PRICE**

10 **Q.** Professor Subramanian, one of your conclusions was that
11 Mr. Musk spent only two days between his initial consultation
12 with the PIF and his presentation of an offer to the Board of
13 Directors; correct?

14 **A.** Correct.

15 **Q.** And having looked through or having someone look through
16 some of the testimony and some of the exhibits, you do know
17 that on January 31st of 2017 Mr. Musk met with the PIF and
18 talked about going private; right?

19 **A.** Correct. But I recall board minutes shortly after saying
20 he had shut that down.

21 **Q.** Now, you know at that point that the PIF representative
22 said that:

23 "Even though going private would cost a lot
24 of money, that's no problem. We have a lot
25 of money." You know that; right?

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1 **A.** This is in January of 2017?

2 **Q.** Yes.

3 **A.** I don't recall that specific claim.

4 **Q.** You know that in March 2017 he had a dinner meeting with
5 the Saudi fund and SoftBank where they discussed taking Tesla
6 private?

7 **A.** Yes, that sounds correct.

8 **Q.** You know, in fact, in early 2017 he had a meeting with
9 Mr. Dees and Larry Ellison and SoftBank where they talked
10 taking Tesla private; correct?

11 **A.** Again, that sounds familiar. They shut that all down in
12 the board minutes as of mid-2017.

13 **Q.** They decided not to go forward with it at that point;
14 correct?

15 **A.** Correct.

16 **Q.** And then you know that in both May and July of 2017 that
17 Mr. Musk met with the PIF at SpaceX to discuss taking Tesla
18 private; correct?

19 **A.** That I don't recall.

20 **Q.** Do you recall that at one of those meetings Mr. Musk said:
21 "If you're serious about this, start buying shares in Tesla to
22 show your interest;" correct?

23 **A.** That sounds familiar. I don't recall the specifics.

24 **Q.** In any of the examples that you used, you said you looked
25 at 30, this database?

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1 **A.** Which database are we talking about?

2 **Q.** The database you used for your report. I forgot the name
3 of it.

4 **A.** There's 45 in the original sample. Then 30 in the sample
5 submitted with the report.

6 **Q.** And then -- did the -- did the management, you know, he
7 made conditions, or she made conditions, that the potential
8 thunder proved their interest by going out and buying, you
9 know, billions in stock in the market. Did that take place in
10 any of those other transactions?

11 **A.** Well, you said buying billions of dollars of stock, most
12 of these deals aren't even that big. So billions of dollars of
13 stock would be hard to buy in those deals compared to this
14 deal.

15 **Q.** Okay. Well, let me change it. In those transactions, did
16 you see evidence that the -- the person in management who
17 wanted to take this -- the company private insisted that the
18 funder first, to show good faith, to show that they had a real
19 interest in this, go out and buy a significant amount of stock
20 of that company?

21 **A.** I don't recall looking for that kind of information. It's
22 possible Silver Lake held a stake in Dell, but I just don't
23 recall.

24 **Q.** By the way, in the materials it says that you relied on in
25 your report you don't actually list any board minutes from

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1 2017, do you?

2 **A.** Well, the relied-on list is my list of things that are in
3 the footnotes. So it is possible that I looked at the board
4 minutes, concluded that Mr. Musk had shut down the process in
5 2017 and then didn't rely on that fact, because the process
6 began, as I see it, on July 31st, 2018.

7 **Q.** And when you say it's possible, is that what you're
8 telling us happened, or are you just trying to come up with a
9 reason why it's not in your report?

10 **A.** I'm sorry. I said it is possible that I looked at the
11 board minutes in 2017. I don't recall as I sit here now. But
12 just because it's not in my exhibit doesn't mean that I didn't
13 look at it.

14 **Q.** Did you read the deposition of Mr. Ahuja or Mr. Teller,
15 which are listed in your report, to determine their -- what
16 they saw happen during those meetings in 2017 with the PIF?
17 Did you read to find out what actually happened?

18 **A.** In 2017?

19 **Q.** Yeah. In the meetings that I just talked to you about.

20 **A.** That was not a focus of my analysis because, as I said,
21 Mr. Musk had shut down those discussions and said there was no
22 buyout possibility in 2017. It began on July 31st of 2018.

23 **Q.** And so the process is talking buyout, Mr. Musk says no to
24 PIF. Talking buyout, Musk says no. Talking buyout, Musk says
25 no. July 31st, Musk says yes.

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1 **A.** It's not as clear-cut as what you just said. CEOs are
2 always talking to bankers and funders of different sorts to
3 look at different possible transactions. They are constantly
4 trying to figure out what is the right capital structure,
5 what's the right financing for this company. Those
6 conversations are going on on a regular basis.

7 Methodologically, to make an apples-to-apples comparison,
8 you want to think about this deal, when did this deal start.
9 So, for example, in the Dell situation Southeastern emailed
10 Mr. Dell in July of 2012 and it went forward from there.

11 Here there was a meeting on July 31st, 2018 and it went
12 forward from there.

13 **Q.** So you're answer to what my question was, which was
14 characterizing what had happened at Tesla, Mr. Musk, was you
15 don't agree with that characterization I gave, which is PIF
16 approached and Mr. Musk said no. PIF approached and Mr. Musk
17 said no. And finally he said yes. You disagreed with that. I
18 just want to make sure, because that was my question. Did that
19 happen?

20 **A.** I think he shut down the discussions in 2017 in part
21 because a deal wasn't feasible, and Mr. Son from SoftBank was
22 part of the buyout group. And so there were lots of
23 deal-breaker issues that made it a non-starter in 2017.

24 **Q.** Now, you also told the jury that Mr. Musk's tweets suggest
25 that he wanted to make a first and final offer and skip over an

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1 approval process by the board and that that, I think you said,
2 made this illusory. Do you recall saying that?

3 **A.** The "illusory" comment, I think, was in respect to the 30
4 days. The 30 days made this an illusory offer.

5 I think the shareholder vote was just a fundamental
6 misunderstanding of the process or maybe something that's
7 incoherent, but I don't know if it's illusory or not. The
8 illusory is representative of 30 days.

9 **Q.** Well, let's look at both of those. Let's first look at
10 whether or not the tweets -- well, let's look at whether or not
11 your conclusion that Mr. Musk wanted to make a first and final
12 offer, whether or not that's supported by the evidence.

13 Now, you looked at, you said, the tweets.

14 (Document displayed)

15 **Q.** And if we look at Exhibit 13, which is in evidence, and
16 the second sentence:

17 "Only reason why this is not certain is that
18 it's contingent on a shareholder vote."

19 Do you see that?

20 **A.** Yes.

21 **Q.** Okay. And you've told us you read that as being
22 supportive of your opinion that Mr. Musk's intent, you know,
23 was to make a first and final offer and skip over any other
24 process before the shareholder vote; right?

25 **A.** This is part of it. There's also the blog post that's

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1 attached here. That's also relevant for that opinion.

2 Q. And does the blog post attached hear say that he's making
3 a first and final offer; that that's the end of the process?

4 A. Yes.

5 Q. That's your characterization of Exhibit -- I think it's
6 Exhibit 12?

7 A. Correct. And I can show you, if you want.

8 Q. Sure. Let's make sure we know what you're referring to,
9 that you're saying Mr. Musk's intent was to make a first and
10 final offer.

11 (Document displayed.)

12 Q. So we'll scroll up to what you want to show the jury.

13 A. Okay. So the first sentence talks about the 420. There's
14 that number there.

15 And then if you go down to the bottom of the screen, it
16 says -- just leave it there, please.

17 The sentence that's now third paragraph from the top:

18 "Either they can stay investors in a private
19 Tesla or they can be bought out at 420 per
20 share."

21 So that's the choice that shareholders are being offered,
22 420 or stay in a private Tesla. There is no mention of a bump
23 or negotiation with a special committee or any of the things
24 you typically see in an MBO.

25 Q. That was his offer, 420 and the structure of the ability

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1 to stay in a private Tesla. That tells you nothing about
2 whether or not that's going to be his final offer or whether or
3 not there's going to be any process with the board. It says
4 nothing about that, does it?

5 **A.** The sentence speaks for itself. They can either stay
6 investors in private Tesla or they can be bought out at 420 per
7 share.

8 He's not saying: I'm going to negotiate with a special
9 committee. There's going to be a bump in that offer from 420
10 to call at 450 and then shareholders will have a choice. That
11 would have been the proper process, but there's nothing along
12 those lines in this sentence.

13 **Q.** So he should have said: My proposal is 420 per share.
14 Shareholders can stay, but if you negotiate with me, I might go
15 higher?

16 **A.** Absolutely. That's what every buyout says. For example,
17 Mr. Dell said: My proposal is contingent upon approval by a
18 special committee of directors. There is going to be a
19 negotiation. It will then go to shareholder vote. That is a
20 very typical process. That's not what was done here.

21 **Q.** Well, in fact, if you look at this in context, you'll
22 agree you should include the offer he actually presented to the
23 board on August 2nd; right?

24 **A.** What is the question?

25 **Q.** If you're going to read into these tweets whether or not

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1 Mr. Musk intended to have the board analyze and approve this
2 deal before being presented to the shareholders, if you -- if
3 you want to do that, you should look at the entire context and
4 see what Mr. Musk actually said to the board on August 2nd?

5 **A.** Okay.

6 **THE COURT:** Now you're losing me. I thought you were
7 focusing on whether this was intended to be a first and final
8 offer, not whether -- not the process, but whether that was the
9 result.

10 I think for the jury's sake you should clarify your
11 question.

12 **BY MR. PRICE**

13 **Q.** Your opinion is -- let me get this -- that he wanted to
14 make a first and final offer and skip over the approval process
15 and proceed directly to shareholder vote. That was your
16 complete opinion; right?

17 **A.** My complete opinion?

18 **Q.** I mean, on that topic. I didn't misread that.

19 **A.** I think you paraphrased it, but yes, what's on the screen
20 is my opinion.

21 **Q.** Okay. And you said the tweets, both saying that on
22 August 7th that -- if we can put up Exhibit 8 again -- I'm
23 sorry, Exhibit 13.

24 (Document displayed.)

25 **Q.** (As read):

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1 "Only reason why this is not certain is that
2 it's contingent on a shareholder vote. That
3 supports your conclusion that Mr. Musk's
4 intent was to skip over any approval process
5 and go straight to the shareholder vote."

6 Right?

7 **A.** You're saying his intent. Again, I have no idea what was
8 in his mind. I can read the words on the page, and the words
9 on the page say "only reason why this is not certain." It's
10 not talking about a special committee process.

11 In my data 20 percent of the deals fall apart because the
12 special committee and the CEO can't agree on a price. There's
13 no mention of that here.

14 He's basically saying only reason why this is not certain
15 is that it's going to the shareholder vote and they might vote
16 it down. That's just not true. It's wrong.

17 **Q.** Sir, isn't it a possibility, since you can't read his
18 mind, that what he meant here is that the only obstacle I,
19 Mr. Musk, think that stand in the way of this is the
20 shareholder vote, because that matters to me and I don't know
21 what the result is going to be.

22 Isn't it possible that's what he was saying about his
23 confidence?

24 **A.** Anything is possible. But let me observe, as I said
25 earlier, the special committee will have insight onto the long

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1 term prospects of Tesla, non-public information.

2 There is a really important meaningful negotiation between
3 the special committee and the CEO in any MBO, because public
4 shareholders don't have access to that information. The
5 special committee does.

6 And so for Mr. Musk to assume, as you're saying, that the
7 special committee would just roll over and agree to 420 or
8 somehow there would be 100 percent chance of getting the
9 special committee approved, it's just not true. It's just not
10 right.

11 Q. Well, you may question his judgment. And I didn't use the
12 word "roll over."

13 You've heard from a number of people, including
14 Mr. Littleton, that the market perceived Mr. Musk as being a
15 very persuasive guy; right?

16 A. Mr. Littleton said that?

17 Q. You didn't hear him say that?

18 A. No.

19 Q. Okay. And you're not considering the possibility that
20 what Mr. Musk meant here wasn't: I'm going to bypass the
21 entire process. I'm going to give a first and final offer to
22 the shareholders.

23 You're not considering the possibility that what he's
24 saying here is: I think the only thing that stands in the way
25 of this is shareholder vote?

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1 **A.** Well, he'd have no basis for that opinion. But let me
2 just flag that had he gotten legal advice before he put this on
3 the table, the lawyers would have said: There's going to be a
4 special committee. They are going to negotiate with you. It's
5 going to be a back-and-forth. There's going to be a price
6 bump.

7 All that would have been part of the legal guidance that
8 an attorney would have given to Mr. Musk in advance of this
9 August 7th tweet.

10 **Q.** So your read of this, just to be clear, is that he planned
11 to bypass board approval in order to present an offer to the
12 shareholders. That wasn't going to happen.

13 **A.** You said "he planned." Again, I don't -- can't tell you
14 what's in his head. All I can say is this is just wrong. As a
15 matter of deal process, this is wrong. This isn't correct.

16 **Q.** Well, what you said was that this suggests he wanted to
17 bypass board approval and go straight to the shareholders;
18 right?

19 **A.** That's my opinion -- that's my inference reading this
20 sentence, yes, but I don't know what was in his head.

21 **Q.** Well, maybe if we look at the August 2nd proposal that he
22 actually made to the board, that's Exhibit 81.

23 (Document displayed.)

24 **Q.** This is a presentation he actually made to the board on
25 August 2nd; right?

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1 **A.** You said -- it's an email, not a presentation.

2 **Q.** Well, it's what has been described in the documents you've
3 reviewed as an offer to the board; right?

4 **A.** It says "Offer to take Tesla private at 420."

5 **Q.** And so in -- in telling this jury that the August 7th
6 tweet that we looked at suggested he wanted to skip the board
7 and go straight to the shareholders -- just tell me "yes" or
8 "no" -- in considering that, did you take into context the fact
9 he had actually presented an offer to the board to take Tesla
10 at 420 on August 2nd? Did you consider that? "Yes" or "no."

11 **A.** Yes. And if you read the email text, it supports my
12 position, my opinion on this particular point.

13 **Q.** Well, let me ask you questions about that. If you look at
14 the second paragraph from the bottom, he says (as read):

15 "Unless another bidder comes forward with a
16 better offer, I would ask that this matter be
17 put to a shareholder vote."

18 Do you see that?

19 **A.** Exactly my point.

20 **Q.** So there he's telling the board that -- I mean, don't you
21 read this as him saying: I want you, the board, the board, to
22 approve this and put it to a shareholder vote unless you get
23 another bidder?

24 **A.** Yes. The 420 should go to a shareholder vote. That's
25 what this sentence says.

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1 **Q.** But because he's talking about bidders, you understand
2 what he's saying here is that: I want the board to agree to
3 put this to a shareholder vote unless you've got a better
4 offer? Isn't that what he's saying there?

5 **A.** Only the board can put it to a shareholder vote. He can't
6 put it to a shareholder vote by himself.

7 But he is saying -- and this sentence highlights the
8 point -- I want this 420 to be put to a shareholder vote at the
9 earliest opportunity.

10 **Q.** And that's --

11 **A.** I don't know how more clearly it can be said. That's
12 what's on the screen.

13 **Q.** And that's what most bidders do. They say: I am telling
14 you, the board, this is what my offer is, and I want to get
15 your approval as quickly as possible; right?

16 **A.** No.

17 **Q.** Well, you mentioned -- oh, before I go there. You also
18 looked at the August 3 minutes of the board that took place
19 after this; correct?

20 **A.** Correct.

21 **Q.** Okay.

22 **MR. PRICE:** And if we can show that? That's
23 Exhibit 83.

24 (Document displayed.)

25

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1 **BY MR. PRICE**

2 **Q.** And there Mr. Musk actually presents himself to the board
3 and discusses his offer; correct?

4 **A.** You said "presents himself to the board." He's at the
5 meeting, yes.

6 **MR. PRICE:** Your Honor, I will move Exhibit 83 into
7 evidence.

8 **THE COURT:** Any objection?

9 **MR. APTON:** No, Your Honor. Thank you.

10 **THE COURT:** Admitted. You may publish.

11 (Trial Exhibit 83 received in evidence)

12 **MR. PRICE:** And if we can go to 83-2?

13 (Document displayed.)

14 **BY MR. PRICE**

15 **Q.** And the second paragraph you see this is where he
16 describes his desire for current shareholders to remain
17 shareholders in the company after privatization, but allowing
18 investors who aren't interested in owning shares to have their
19 shares bought out; correct?

20 **A.** Yes.

21 **Q.** And he talks about the basis for his price of \$420 per
22 share. He's very upfront about that; correct?

23 **A.** You said "he's very upfront about that." I don't know,
24 but I can read the words, explain the basis for his proposal,
25 yes.

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1 Q. Okay. And then in the second to the last paragraph he
2 says (as read):

3 "As for governance, he noted his goal" --

4 A. I'm sorry. That's not on the screen. If you can put that
5 up, it would be great.

6 Q. I'm sorry. Next to the last paragraph:

7 "As for governance, Mr. Musk noted that his
8 goal is not to materially change the
9 company's shareholder base or concentrate
10 ownership of the company into a single or
11 small group of shareholders."

12 You saw that; correct?

13 A. Yes.

14 Q. And that he wants to take the company private to, quote:

15 "Allowing it to better focus on execution of
16 the business."

17 Do you see that?

18 A. Yes.

19 Q. He said he did not view this transaction as enabling a
20 deregistration and delisting and it's not a change of control;
21 correct?

22 A. That's what it says.

23 Q. In the -- I guess the third example as you talk about in
24 your report that you analyzed of companies going private, those
25 all, all, involved someone in management substantially

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1 increasing their ownership of the company; is that correct?

2 **A.** It can be, but not necessarily.

3 **Q.** But no, that -- we've talked about extreme outliers. That
4 was the case in all of those examples; is that right?

5 **A.** I said no. You're saying that management always increases
6 its stake in the post MBO company. That can happen. It can
7 also not happen.

8 But this is not what this is describing. This is -- as we
9 said earlier, this is an unprecedented transaction. This has
10 never happened before; right? That's what this is describing
11 on the screen.

12 **Q.** Okay. And then if we go to the next page, 83-3.

13 (Document displayed)

14 **Q.** The board then discussed next steps.

15 "It was noted that a detailed proposal
16 regarding a going-private transaction had not
17 yet been made and that one would be needed in
18 order for the board to properly analyze and
19 evaluate it."

20 Do you see that?

21 **A.** Yes.

22 **Q.** So you can tell from this that the board was saying:
23 We're going to analyze a proposal; correct?

24 **A.** That's what it says.

25 **Q.** Give us a detailed, more detailed proposal.

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1 **A.** And it highlights the point that the proposal itself was
2 not very fleshed out at this board meeting. That's what this
3 paragraph is also saying.

4 **Q.** Well, but as to process, the process is the board is going
5 to do an evaluation; correct?

6 **A.** Analyze and evaluate; correct.

7 **Q.** It's not going to skip that and just go straight to the
8 shareholders; right?

9 **A.** What's stunning to me is there is no mention of a
10 negotiation. It says "analyze and evaluate it."

11 And that's also true in the August 13th blog post. It
12 says about evaluating the proposal. There should be a
13 negotiation. There's no contemplation of a negotiation in
14 those board minutes.

15 **Q.** Well, it talks about -- in the proposal itself that there
16 might be other offers. You're not willing to assume that as a
17 matter of course, there would be a negotiation where Mr. Musk
18 could either say: I'm not going any higher, or I will go
19 higher? You're -- you're taking that from the tweet and this.

20 **A.** You want me to assume there was going to be a negotiation
21 even though nobody says there's going to be a negotiation?

22 **Q.** Yeah. It's the natural course of the process.

23 **A.** I agree. I agree. A hundred percent agree with that.
24 But it was -- and it's normally disclosed as such, but it was
25 not disclosed here by either Mr. Musk or in his board minutes.

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1 Q. Did you take into account the presentation that Mr. Dugan
2 [sic] made to Mr. Musk about the process that was going to be
3 followed?

4 A. What date was that presentation?

5 Q. That was August 10th.

6 A. So we're talking about three days later?

7 Q. Yeah. Three days later.

8 A. It's possible that I looked at it, but I don't recall.

9 Q. Isn't it correct -- well, you said that there was not
10 material interaction between Mr. Musk and his advisers,
11 including Silver Lake and Mr. Dugan; correct? That was one of
12 your opinions?

13 A. Can you repeat the name?

14 Q. It's Egon Dugan?

15 A. Durban.

16 Q. Durban, I'm sorry. You're right. Mr. Durban, right?

17 Your opinion is there wasn't significant interaction, not
18 material interaction; right?

19 A. Prior to August 2nd, that's certainly true. I believe
20 it's also true as of the August 7th tweets. There was then
21 discussions, but they were all fairly short term because the
22 whole thing went away within, I think, ten or 15 days.

23 Q. Now, your opinion that you told the jury was Mr. Musk did
24 not meaningfully engage with bankers or lawyers at any point
25 during the process. That's the opinion you gave the jury;

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1 right?

2 A. Yes. That is correct.

3 Q. And now I'm asking you about, isn't it true is that
4 Mr. Dugan made a presentation to Mr. Musk on August 10th which
5 detailed the process that they expected they would follow. Do
6 you recall that?

7 A. I believe there was a kick-off meeting scheduled at some
8 point between August 3rd and August 7th. If you're talking
9 about that kick-off meeting, I can look at the document. I
10 don't recall as I sit here now.

11 Q. And do you recall that one of the things that was
12 discussed is that the time between the presentation of a
13 detailed proposal to the board and the board approving it to be
14 presented to the shareholders could be between one and two
15 weeks. Do you remember that?

16 A. Well, first of all, this is all after August 2nd. This is
17 all after August 7th. So the tweet is out there. The proposal
18 is out there. But this is now three days later, on
19 August 10th; right?

20 So I'm agreeing with you, that Mr. Durban is trying to
21 play some catch-up here, but that's not how these processes
22 work. That preparation should have done weeks earlier, if not
23 months earlier. That's my point.

24 Q. You do not have the opinion -- well, strike that.

25 Are you saying that Mr. Musk, that his plan -- I'm not

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1 going to use "intent," that his plan was not to negotiate with
2 the board. Is that your opinion, "yes" or "no"?

3 **A.** I find no evidence that he was aware that that was
4 supposed to be part of the process. And, in part, that might
5 be explained by the fact that he did not get any significant
6 legal guidance before putting his plan on the table on
7 August 2nd and then to the public on August 7th.

8 **Q.** Is it your opinion that giving the board 30 days to look
9 at a proposal and approve it to send to the shareholders, is it
10 your opinion that that is a -- one of the main factors in
11 coming to your opinion that the offer was illusory?

12 **A.** Well, first of all, I think you mischaracterized the 30
13 days. I think Mr. Musk's testimony is he wanted it to go to a
14 shareholder vote within 30 days, which certainly would have
15 made it illusory.

16 Now, to the extent that Mr. Musk is now saying that it was
17 30 days to special committee approval, in my dataset that's
18 also unprecedented. It just doesn't happen.

19 And notice this is an \$80 billion MBO. It would be almost
20 impossible to happen, even to get the special committee
21 approval within 30 days.

22 So, yes, it is part of my overall opinion that this offer
23 was illusory.

24 **Q.** Okay. Let's look at Exhibit 81, the exact words here.

25 (Document displayed)

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1 Q. Question, last paragraph:

2 "I would ask that this matter be put to a
3 shareholder vote at the earliest opportunity.

4 This offer expires in 30 days."

5 Do you see that?

6 A. Yes.

7 Q. Okay. And that is not unusual, in other words, to light
8 the fire under the board, to say: I am putting a limit to this
9 offer, so you get off your leather seats and you start going
10 through this process. That's not unusual at all, is it?

11 A. I disagree with that.

12 Q. Well, you said that the Perry Ellis transaction was
13 typical of these MBOs, except that in that transaction the
14 bidder one day, after making the presentation to the board,
15 made a public disclosure.

16 Do you remember saying that in your direct examination?
17 Because that was the big difference.

18 A. That totally mischaracterizes my testimony. I said that
19 the MBO sample, it is very common for the company to manage the
20 disclosure of the MBO offer.

21 In that instance, the Perry Ellis instance, the CEO
22 disclosed it. That was a counter-example, but it could have
23 been different on other dimensions as well from the typical
24 proposal.

25 Q. Well, let's talk about that. In that example, the bidder,

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1 the former chairman, current director and manager, set a 32-day
2 deadline for a favorable response to his offer; correct?

3 **A.** From the special committee?

4 **Q.** From -- it's what he said to the board: I'm giving you a
5 32-day deadline; is that correct?

6 **A.** If you could show me his deadline, I'd like to see it,
7 because it's the difference between the special committee
8 approval within 32 days versus shareholder approval within 32
9 days.

10 (Whereupon document was tendered to the witness.)

11 **Q.** Do you have that in front of you, sir?

12 **A.** I do.

13 **Q.** And you see this is a proxy statement concerning Perry
14 Ellis; correct?

15 **THE COURT:** Let's identify it. Is there a proposed
16 exhibit number of 1023?

17 **MR. PRICE:** It is 1023, Your Honor.

18 **THE COURT:** Thank you.

19 **BY MR. PRICE**

20 **Q.** 1023 is a proxy statement from Perry Ellis, correct?

21 **A.** Yes.

22 **Q.** It's a proxy statement which is part of the materials you
23 purportedly relied on; right?

24 **A.** I relied on, yes.

25 **Q.** Okay. And did you read this or was this something that

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1 you delegated to one of your assistants?

2 **A.** The coding of the sample is probably something I would
3 have delegated to my research assistant.

4 **Q.** Okay. And if we look at -- by the way, in terms of your
5 work, in order to prepare and give an opinion in this case and
6 look at all these materials, you charge \$1,900 an hour; is that
7 right?

8 **A.** That was my rate at the time that I was retained, yes.

9 **Q.** And have you charged at a higher rate on this case? Have
10 you charged more than 1900 per hour on this case?

11 **A.** No.

12 **Q.** And if we look at 1023-43.

13 **MR. PRICE:** And we can display to witness and
14 attorneys. No need to show it to the jury.

15 Although actually, Your Honor, I move this into evidence.

16 **THE COURT:** Any objection?

17 **MR. APTON:** No, Your Honor. It's okay.

18 **THE COURT:** Admitted.

19 (Trial Exhibit 1023-43 received in evidence).

20 **THE COURT:** So this may be displayed to the jury.

21 **MR. PRICE:** Thank you.

22 (Document displayed.)

23 **BY MR. PRICE**

24 **Q.** Looking at the last paragraph, 1023-43, it says:

25 "On February 6, 2018 the company received an

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1 unsolicited letter from George Feldenkreis,
2 the former chairman."

3 Do you see that?

4 **A.** Yes.

5 **Q.** And that was -- if you keep going. He wanted to acquire
6 the company in an all cash transaction for \$27.50 per share.

7 Do you see that?

8 **A.** Yes.

9 **Q.** And if you look at the last sentence:

10 "Mr. George Feldenkreis noted that if he did
11 not receive a favorable response from the
12 board to the Feldenkreis proposal by
13 March 10, 2018, he intended to evaluate all
14 of his options at his shareholder's company
15 and take appropriate action with respect to
16 his investment."

17 Do you see that?

18 **A.** Yes.

19 **Q.** He's basically saying if you don't -- if the board doesn't
20 act, this is within 32 days, then things are going to get a
21 little iffy; right?

22 **A.** I think you're totally mischaracterizing this paragraph,
23 and it's quite disingenuous.

24 First of all, it's 34 days. Wait a minute -- no, February
25 is 28. So you're right, 32 days. Okay. So I think your

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1 numbers are right.

2 But then, also, notice he's got financial advisers. He's
3 got lawyers. So he's got those. That's the prior sentence.

4 And then you're totally mischaracterizing it. It is
5 apples and oranges between this deal and the one that's on the
6 screen because he says:

7 "Did not receive a favorable response from
8 the board."

9 Now, that probably means forming a special committee,
10 maybe doing some negotiation. Maybe even getting to an
11 approved transaction. That is feasible within 32 days. It's a
12 tight timeline, but it's feasible.

13 Notice, also, this deal is a \$400 million deal. It's
14 1 percent -- or less than 1 percent as large as the Tesla MBO.
15 Literally less than 1 percent.

16 So maybe it's feasible in a deal this small. It's
17 impossible in a deal this big. Especially because Mr. Musk
18 says: I want to go all the way to the shareholder vote within
19 30 days. That is impossible.

20 **Q.** Now, having given that answer, I just want to make sure:
21 You're giving that answer because you've read this and you know
22 exactly how this played out?

23 **A.** I'm reading the words on the page. If you want, I can
24 read the whole thing.

25 **Q.** Okay. But you just told us that this is not a situation

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1 where he is saying that, you know, if you don't -- if the board
2 doesn't give me a favorable response within 32 days, then this
3 offer is off the table. You're saying that's not what he said?

4 **A.** It's an important point you're raising, which is these
5 words are heavily scripted and when he says "did not receive a
6 favorable response," he could have said "unless the board or
7 special committee agrees within 32 days, it's over." But
8 instead he says "favorable response." There's meaning in that.
9 What "favorable response" means is less than, yes, we agree to
10 a deal.

11 And just to be clear, this is very different than getting
12 all the way to a shareholder vote within 30 days. This is
13 quite feasible.

14 **Q.** Well --

15 **A.** If I may finish.

16 This is quite feasible. Thirty days to get to a
17 shareholder vote is impossible.

18 **Q.** And Mr. Musk didn't say "shareholder vote in 30 days." He
19 said "put to a shareholder;" right? The Board of Directors is
20 to put it to them, and then lots of things have to happen
21 before that; right?

22 **A.** You're saying that there could be a proxy that's sent out,
23 but the shareholders are going to vote sometime later on.

24 "Put to a shareholder vote" to me means shareholders vote.

25 "Putting it to a vote in a week," that means they're going to

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1 vote in a week. That's what those words mean.

2 **Q.** Okay. And let's continue to see about this Perry Ellis
3 transaction. If we look at 1023-46. This is Page 35. And
4 it's the -- it's the paragraph that beginning "On March 9,
5 2018."

6 (Document displayed.)

7 **Q.** You see:

8 "On March 9, 2018 Mr. George Feldenkreis
9 submitted a letter to the board which
10 reaffirmed the proposal in all respects. The
11 letter stated that the special committee had
12 not responded to the proposal."

13 Do you see that?

14 **A.** I see those words, yes. But it says, "The special
15 committee sent an NDA." So that was potentially their
16 response.

17 **Q.** Well, he extended his deadline, didn't he? He didn't
18 withdraw his offer; right? On March 9; right?

19 **A.** Where do you see that?

20 **Q.** Well, he says he submitted a letter. They responded, and
21 in the interests of moving forward he proposed they start the
22 due diligence process. Do you see that?

23 The deal wasn't over because there was no approval within
24 32 days; right?

25 **A.** I'm not sure I understand your question. You're asking

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1 me, did he extend the offer?

2 **Q.** Did he keep the process going even though there had not
3 been an acceptance of his proposal?

4 **A.** So, look. This is an unfriendly offer. As you said
5 earlier, he's a director and no longer CEO. He's going to go
6 to a proxy context. That's very hostile.

7 They are asking him to sign a confidentiality agreement
8 saying: You're not going to use this information in some
9 negative way to the company. It's a very standard thing to ask
10 for. He's resisting that. There's back-and-forth.

11 You're saying that because of that haggling over the NDA,
12 he's continuing the process. That sounds right to me based on
13 this paragraph, but I'd have to look in a lot more detail.

14 Notice, just to observe, he has been advised by lawyers
15 and bankers throughout this process, including before he
16 brought the proposal to the board. So this, I think, is closer
17 to the typical process. Certainly much, much closer than the
18 Musk proposal here.

19 **Q.** You understand that I'm asking you about the process of
20 saying: There is a deadline. Mr. Musk said 30 days.
21 Mr. Feldenkreis said 32. And you gave opinions on the effect
22 of that deadline.

23 You understand that I'm asking you about whether or not it
24 is typical that people give deadlines and then extend them
25 through negotiation. You understand that's the focus here;

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1 right?

2 **A.** I don't know what the focus is.

3 **Q.** Okay. Because you keep saying: Oh, by the way, they
4 weren't lawyers and all this stuff. I know that's one of your
5 points, but I'd like to focus on your opinion that you gave and
6 told the jury; that it was highly unusual, made the offer
7 illusory that Mr. Musk said this offer exists for 30 days.
8 We're focusing on that.

9 **A.** And you're saying that he has extended his formal offer
10 beyond the 32 days. I don't see that in this paragraph. If
11 you want to point to where he says that, I'm happy to look at
12 it. I don't see that in this paragraph.

13 **Q.** Let's continue and see what happened. If you look at
14 1023-56.

15 (Document displayed.)

16 **Q.** And by the way, if you had yourself done the work, at
17 \$1,900 an hour, and reviewed the materials you say you relied
18 on, you would have some idea of what process happened in the
19 Perry Ellis transaction; right?

20 **A.** I reviewed 45 deals my first sample. I reviewed 30 deals
21 in this sample. I was coding for certain elements of the deal.

22 So, for example, was there a financial advisor? Was there
23 a lawyer? Those are the things I was coding for. I did not
24 code for whether there was a deadline in the offer, whether the
25 deadline was extended. I did not code for those things, so I

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1 don't know if I would have noticed it had I been coding myself.

2 I did observe in this deal there was a 30-day fuse put on
3 the offer. It has to go to a shareholder vote in 30 days.

4 That is impossible. Doesn't matter about the data. That is
5 just impossible.

6 Q. And for that, you're assuming from the August 1st offer
7 that what Mr. Musk meant wasn't that they had to put it to the
8 shareholders, but that they had to go through all the process
9 to get to a vote. That's what you're assuming?

10 A. Do you want to go back to the August 2nd email to the
11 board? We can do that, if you want.

12 Q. Let me ask you this: As part of reaching your opinion,
13 did you look at Mr. Musk's testimony?

14 A. Yes.

15 Q. Okay. And did you observe that he said that if the board
16 came back and there was another bidder, that he probably would
17 have gone higher. Did you see that?

18 A. I don't recall that, but it's possible he said that.

19 Q. All right. Now, getting back to this other example, Perry
20 Ellis, which is in your database, 1023-56.

21 You see on May 23rd it talks about Mr. Feldenkreis sent a
22 letter to the special committee made by a press release urging
23 them to commit to a deadline. And the last sentence:

24 "He stated that if the company would not
25 enter into a definitive acquisition agreement

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1 by May 29, 2018, he would withdraw his
2 proposal and pursue all other rights as a
3 shareholder."

4 Do you see that?

5 **A.** Yes.

6 **Q.** Well, he didn't withdraw. That deadline was extended;
7 right?

8 **A.** I think this is getting a little silly. There was a
9 proposal put on the table. He wanted a favorable response.
10 They had enough of a favorable response that they continued the
11 conversation.

12 Notice this is May 23rd. This is four months after the
13 process started and it's still on the table. They are still
14 talking about it. That is a typical timeline.

15 I think I'm agreeing with you that there was an offer put
16 on the table back in February. The deal still seems to be
17 puttering along as of May. I agree with that.

18 Whether it was taken off the table, put back on the table,
19 this is a fairly typical process. There is a long process from
20 the initiation to the closing. We're not even close to the
21 finish here and it's been four months.

22 That's a good illustration of an overall timeline, and
23 it's only 1 percent as big as the deal would have been here.

24 **Q.** And it's a good illustration about in this process when
25 someone says "this offer is on the table for 30 days," that

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1 they will continue to renegotiate that; right? This is
2 illustrative of that process.

3 **A.** Do you want to put the email back from Mr. Musk on
4 August 2nd? It says that there's a 30-day deadline. There is
5 no mention of, "and if you don't meet my deadline, I'm going to
6 extend the offer." There's nothing in that email that suggests
7 that.

8 **Q.** Okay. Well, here on May 23rd, at 1023-56, that I just
9 showed you, where it says:

10 "Mr. Feldenkreis stated if the company would
11 not enter into a definitive acquisition
12 agreement by May 29, 2018, he would withdraw
13 his proposal and pursue all other rights as a
14 shareholder."

15 It doesn't say here he will extend that either, does it?

16 **A.** Correct.

17 **Q.** All right. But that's what he did; right? Deadline
18 wasn't met. Negotiations continued, right?

19 **A.** You're saying that the May 29 deadline was not met?

20 **Q.** Well, here, let's go forward to 1023-58. His deadline was
21 to have a definitive agreement by May 29.

22 (Document displayed)

23 **Q.** And here on May 31st -- this is at 1023-58. You see that
24 on May 31st, 2018:

25 "In respect of the Feldenkreis proposal

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1 advised, et cetera, that he would withdraw
2 his proposal if he couldn't enter into a
3 definitive agreement with the company by the
4 end of the day."

5 Now we're on the 31st. So we passed one deadline. They
6 are still negotiating; right?

7 **A.** Yes. And this is a great example. It's been four months
8 since the offer was put on the table. This deal is 1 percent,
9 or less than 1 percent as large than the Musk deal would have
10 been. It's been four months. This is the typical time line.

11 I think your point is Mr. Musk set a 30-day deadline. He
12 could have extended it. I agree with that. He could have
13 extended it. But there is no evidence that he was going to as
14 of August 2nd.

15 **Q.** Was there any evidence that Mr. Feldenkreis was going to
16 when he first set his deadline? Isn't that typical of the
17 process; that you set deadlines to get people to act and then
18 you continue the negotiations, or you can back away, but that's
19 not -- that's not unusual.

20 **A.** You're saying Mr. Musk set a deadline. He could extend
21 the deadline. I agree with that.

22 **Q.** Well, what you told the jury in your direct is the fact
23 that he said: This offer expires in 30 days. You said that
24 told you that this offer was illusory because that meant that
25 everything would be over in 30 days, period, end of story.

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1 That's what you said on direct.

2 **A.** If I make an offer and the deadline I put in my offer is
3 not feasible, then, yes, it is an illusory offer.

4 If you offer to buy my house and say: Guhan, I'll buy
5 your house, but the offer expires at 4:00 o'clock today.

6 You've got to move out by 4:00 o'clock today. That is an
7 illusory offer. Because I cannot accept it and move out of my
8 house within three hours. That's the equivalent of what's
9 going on here.

10 **Q.** It is not an illusory offer if what you're saying is what
11 I expect to happen within 30 days is for the board to reach an
12 agreement with me that they will present a proposal to the
13 shareholders. That's not illusory, is it?

14 **A.** It's not impossible, but in my sample it has not been
15 done. Thirty days has not been done, even in my sample of 30
16 other deals and those are deals that are much smaller.

17 So 30 days to get to special committee approval, I think
18 you're correct. It's not impossible, but it's unprecedented.

19 Again, I think his -- his 30-day deadline was shareholder
20 vote. It wasn't special committee. It was shareholder vote.
21 That's what I read.

22 **Q.** Well, again, Mr. Dugan --

23 **A.** Who?

24 **Q.** Durban, I'm sorry.

25 Mr. Durban, who was the adviser in the Dell transaction,

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1 you said was an expert on the Dell transaction, did you
2 notice --

3 A. Financial adviser on the Dell transaction.

4 Q. Financial adviser. Also an adviser on process; right?

5 A. In Dell?

6 Q. Yeah.

7 A. No. He was a buyer.

8 Q. He was the buyer. So you think he would be familiar with
9 the process?

10 A. Yeah. You said advising on process. Typically it would
11 be the lawyers who advise on process.

12 Q. And he says you can go from proposal to the board
13 approving something going to the shareholders in one to two
14 weeks; right?

15 A. Can you direct me to his testimony? I'm surprised by
16 that. It's not in my sample. That's not done in my sample.

17 Q. Well, he's going to be here. Again, you took the stand
18 before you had the opportunity to observe his testimony; right?

19 A. Correct.

20 Q. But you did have the opportunity to read his deposition
21 transcript and to review the exhibits to that deposition
22 transcript; right?

23 A. Correct.

24 Q. So if you're not aware that that was his advice, that's on
25 you, isn't it?

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1 **A.** Well, there's two possibilities. Either you're
2 mischaracterizing his testimony, or you're characterizing it
3 correctly and he's just wrong.

4 Because in my dataset it's just not done. It's just not
5 feasible. Is it impossible? No. But it's unprecedented to
6 get to a deal this size in two to three weeks. Even one -- he
7 said one to two weeks. It's unprecedented. Is it physically
8 possible? Yes, maybe.

9 **Q.** So in the Perry Ellis transaction the deadline on the
10 offer was 32 days; correct?

11 **A.** The deadline on getting a positive response from the board
12 was 32 days.

13 **Q.** And Mr. Musk said his offer expired in 30 days; right?

14 **A.** Correct.

15 **Q.** In the Perry Ellis situation the bidder, not the special
16 committee, made the public announcement about the bidder's bid;
17 correct?

18 **A.** Correct. In the 13D filing with the SEC.

19 **Q.** But the special committee had no control over that;
20 correct?

21 **A.** Correct. And that was an exceptional situation.

22 **Q.** And in Mr. Musk's case, you know, he made his tweets on
23 August 7th. It wasn't the special committee; right?

24 **A.** Correct.

25 **Q.** And the time from the board disclosure to the public

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1 disclosure in the Perry Ellis case was one day; right?

2 **A.** That sounds possible. But, again, the CEO or the buyer
3 was well advised by bankers and lawyers in advance of that
4 presentation to the board.

5 And, yes, he disclosed it unilaterally. That was quite
6 unusual. And I flagged it in my direct testimony. It's
7 extraordinarily rare for that to happen. So it happened there
8 and it happened here; correct.

9 **Q.** And you're not making an opinion that Mr. Musk did that --
10 strike that.

11 And the time from the public announcement by the bidder in
12 the -- in Perry Ellis to the special committee being empowered
13 to negotiate, that was six days; correct?

14 **A.** You'd have to direct me. It took four months to get to a
15 deal, but I don't know. You want to show me the document where
16 it says six days?

17 **Q.** Well, I'm talking about the process. Do you remember one
18 way or the other whether or not the time from public
19 announcement to the special committee being empowered to
20 negotiate is 26 days?

21 **MR. APTON:** Are we talking about Perry Ellis, Your
22 Honor? I would object if we are.

23 **THE COURT:** Yes, Perry Ellis.

24 **MR. APTON:** Objection, Your Honor.

25 **THE COURT:** All right. We've spent a lot of time on

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1 this and, frankly, we're reaching a 403 issue here. You're
2 doing a trial within a trial. I understand your point, but I
3 urge you to move on.

4 **MR. PRICE:** I'm coming to one last five minutes of
5 questions.

6 **THE COURT:** Okay.

7 **BY MR. PRICE**

8 **Q.** The premium on the Perry Ellis case was -- over market was
9 18.6 percent; right?

10 **A.** It's possible.

11 **Q.** And the premium Mr. Musk proposed was 20 percent; right?

12 **A.** That was his calculation, 20 percent, yes.

13 **Q.** So one of the things that you observed in this case, by
14 the way, was that you saw the August 13th post; right?

15 **A.** The August 13th what?

16 **Q.** Post.

17 **A.** Correct, yeah.

18 **Q.** And looking at that post, you read that post as indicating
19 that funding was not secured; right?

20 **A.** Can you show it to me? It says some things about funding.
21 It's not at all clear what those things are, but if you want to
22 show it to me, I can try to answer your question.

23 **Q.** Here. Let me direct you to your deposition testimony so
24 we can shortcut this. You have it in front of you. It's 215,
25 Lines 16 to 20.

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1 **MR. APTON:** Your Honor, I object on completeness here.
2 There were other portions of the testimony that addressed this.

3 **THE COURT:** Let me just look at this. 215, Lines --
4 which?

5 **MR. PRICE:** Here. Let's do 216, Line 17 to 217, Line
6 1. This --

7 **THE COURT:** All right. Hold on.
8 (Brief pause.)

9 **THE COURT:** All right. Let me point out whether you
10 have -- what do you suggest for completeness, counsel, if
11 you're objecting on completeness grounds?

12 **MR. APTON:** Yeah, Your Honor. Can I have just one
13 moment? I'm trying to find the portion.

14 **MR. PRICE:** At this point I'm going to use it just to
15 refresh his recollection.

16 **THE COURT:** Well, all right. If you want to -- well,
17 so ask the question again. Then if he can't remember, then you
18 can direct him to some portion, without reading it.

19 **MR. PRICE:** Sure.

20 **BY MR. PRICE**

21 **Q.** Your belief, having looked at the August 13th post, is
22 that it indicated that funding wasn't secured; right?

23 **A.** Could I look at it again? Maybe I could just look on the
24 screen or something.

25 **Q.** It's a long document. You can look at that, or I'm

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1 suggesting if it helps refresh your recollection, because it
2 seems like you don't recall, that you could look at your
3 deposition testimony, and particularly 216, Lines 23 to 217,
4 Line 1?

5 **A.** Could you show me the original document, please?

6 **THE COURT:** Well, he's trying to refresh your
7 recollection with a particular document. If you -- after you
8 read it that still doesn't help you, you can say that and he
9 can try another document.

10 **THE WITNESS:** Okay.

11 **THE COURT:** So just read --

12 **THE WITNESS:** My recollection --

13 **BY MR. PRICE**

14 **Q.** I will put this up and see if it will help you recollect.

15 (Document displayed to the witness.)

16 **Q.** See Line 23 there? I'm not going to read it at this
17 point.

18 **A.** So what's the question?

19 **Q.** Sure. My question was exactly that, that you believe the
20 August 13th post indicates that funding was not secured; right?

21 **A.** My recollection of the August 13th document is that
22 Mr. Musk, through the company, said that he had been talking
23 with the Saudis; that there was likely to be funding, but it
24 was forward looking, but the funding was not yet secured. It
25 was forward looking, but some funding may be secured.

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1 And that's my recollection of the document. I don't have
2 it in front of me.

3 **Q.** And from reading that, you concluded that that August 13th
4 post indicated that funding was not secured?

5 **A.** Again, my recollection of the document is that he was
6 talking about future funding from the PIF, not current funding
7 existing at the time.

8 **Q.** And that is why you thought it indicated not secured?

9 **A.** Well, I guess to make it clear-cut, the 13th document
10 should say: On August 7th I tweeted "funding is secured."
11 That's not true. Funding is not secured. I'm still talking to
12 the Saudis. Hopefully, it will be in place soon, but it's not
13 yet secured.

14 That would have been clarifying the thing that was tweeted
15 on August 7th, but this is, I think, more murky than that is my
16 recollection of the August 13th document.

17 **MR. PRICE:** Well, Your Honor, I would just read 23 to
18 1.

19 **THE COURT:** I'm sorry?

20 **MR. PRICE:** I would just read those five -- four lines
21 then.

22 **A.** I stand by what's on the screen. But I'm saying it's not
23 clear-cut any more because on August 7th Mr. Musk says "funding
24 is secured," past tense.

25 On August 13th --

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1 **THE COURT:** All right. Let's do this. You can read
2 this and your attorney -- the attorney on redirect can complete
3 this. Go ahead and read it.

4 **BY MR. PRICE**

5 **Q.** (As read)

6 **"QUESTION:**So you believe the August 13th post
7 indicates that funding was not secured, in
8 past tense?

9 **"ANSWER:**Correct."

10 **MR. PRICE:** Thank you, Your Honor.

11 **THE COURT:** All right. Redirect?

12 **REDIRECT EXAMINATION**

13 **BY MR. APTON**

14 **Q.** Professor, can you just give us and the jury just 15 more
15 minutes, okay?

16 **A.** Sure.

17 **Q.** Okay. I want to start off by --

18 **MR. APTON:** Can we show Exhibit 83, please?

19 (Brief pause.)

20 **MR. APTON:** I'm sorry. Is 83 up?

21 (Document displayed.)

22 **BY MR. APTON**

23 **Q.** Professor, do you see Exhibit 83?

24 **A.** Yes.

25 **Q.** And at the top of the page there, that is a list of the

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1 individuals who attended the August 3rd board meeting at Tesla;
2 correct?

3 **A.** Correct. Among the board, those are the directors
4 present.

5 **Q.** And you see Elon Musk there; correct?

6 **A.** Correct.

7 **Q.** And on Page 3, it says:

8 "The board then discussed next steps. It was
9 noted that a detailed proposal regarding a
10 going-private transaction had not yet been
11 made and that one would be needed in order
12 for the board to properly analyze and
13 evaluate it."

14 Did I read that correctly?

15 **A.** Yes.

16 **Q.** Okay. And this was on August 3rd?

17 **A.** Correct.

18 **Q.** The 4th, 5th, 6th, 7th -- four days later he then tweets
19 "Funding secured and investor support is confirmed. Only
20 reason why" -- do you remember the rest of the tweet?

21 **A.** "Only reason why is the shareholder vote," something to
22 that effect.

23 **Q.** It was Exhibit 8; right?

24 **MR. APTON:** Can we see Exhibit 8? That was "funding
25 secured."

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1 (Document displayed)

2 **MR. APTON:** It was Exhibit 13, I believe.

3 (Document displayed.)

4 **BY MR. APTON**

5 **Q.** Which is somehow he's saying that this deal is done
6 pending a shareholder vote.

7 He had not yet even submitted a formal proposal to the
8 board; correct?

9 **A.** I think that's correct, yes.

10 **Q.** And counsel referenced some other tweets that came in on
11 August 7th.

12 **MR. APTON:** Can we look at Exhibit 9?

13 (Document displayed.)

14 **MR. APTON:** No. 10.

15 (Document displayed.)

16 **MR. APTON:** And then No. 11.

17 (Document displayed.)

18 **BY MR. APTON**

19 **Q.** During your cross, you referred to this tweet in
20 particular, in Exhibit 11, as, quote, deeply problematic. Do
21 you recall that?

22 **A.** Yes.

23 **Q.** And why did you refer to it like that?

24 **A.** Well, it does highlight this take-it-or-leave-it,
25 first-and-final nature of his 420. He's saying the same thing

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1 that he said in the August 7th blog post, which is you've got a
2 choice. You can take the 420 or you can keep shares in the
3 private company.

4 There's two problems with that. One is, how is that going
5 to work? There is no precedent for shareholders staying in the
6 company when it goes private. You can't just flip a switch and
7 suddenly the company is private, no longer public. That just
8 isn't how securities law works.

9 But then second, as we're discussing before, it does seem
10 to indicate he wants to give them 420, take it or leave it.
11 There is no contemplation of a negotiation with a special
12 committee. Nothing along the lines of what a typical MBO is
13 like.

14 **Q.** You used the word "unprecedented." That received a lot of
15 attention during your cross. It was in the context of what
16 Egon Durban had potentially advised Elon Musk. Do you recall
17 that?

18 **A.** Yes.

19 **Q.** Do you still have Egon Durban's transcript in front of
20 you? It was dated September 12, 2018.

21 **A.** I'm sorry. I don't think I do. I don't think I have it.

22 **THE COURT:** A deposition transcript?

23 **MR. APTON:** I have a copy right here. May I approach?

24 **THE COURT:** Yes.

25 (Whereupon document was tendered to the witness.)

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1 **MR. APTON:** It's tagged Exhibit 176.

2 **THE COURT:** I don't think I have it.

3 **MR. PRICE:** I don't have it either.

4 **MR. APTON:** I believe it was used to refresh the
5 witness's recollection.

6 **MR. PRICE:** No, it wasn't. Mr. Durban's deposition?
7 No.

8 **MR. APTON:** I believe so.

9 **MR. PRICE:** No.

10 **MR. APTON:** Would Your Honor like a copy?

11 **THE COURT:** Yes.

12 **MR. APTON:** One moment, Your Honor.

13 (Whereupon document was tendered to the Court.)

14 **THE COURT:** Maybe you can lay the foundational
15 question. If you're going to use this to refresh, lay your
16 foundational question.

17 **MR. APTON:** Sure.

18 **BY MR. APTON**

19 **Q.** So, Professor, on Pages 86, Line 25 to 89, Line 24, I'd
20 like you to read that and I'll ask you if that refreshes --

21 **THE COURT:** Before he does that, what's the question
22 to which he does not have a memory for which you want this
23 refreshed?

24 **BY MR. APTON**

25 **Q.** Egon Durban, as an adviser in this transaction, did he

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1 refer to this structure as unprecedented?

2 **MR. PRICE:** You know, I'm going to object. One, they
3 can't refresh his memory about --

4 **THE COURT:** First of all, no. Don't look at that.

5 **THE WITNESS:** Oh, sorry. Sorry.

6 **THE COURT:** Don't look at that.

7 Let's start from clean. Ask the question first. Pretend
8 there is no deposition.

9 **BY MR. APTON**

10 **Q.** Professor, did Mr. Durban refer to this proposed structure
11 as unprecedented?

12 **A.** That is my recollection, yes.

13 **THE COURT:** Okay. You don't have to refresh his
14 recollection.

15 **A.** It's also consistent with my 25 years studying mergers and
16 acquisitions. I've never seen a transaction that looks like
17 what Mr. Musk contemplated here.

18 **BY MR. APTON**

19 **Q.** And let me ask you this: Are you familiar with whether
20 Mr. Musk and Tesla have conducted corporate transactions in the
21 past?

22 **A.** Yes. In my report I document several prior transactions
23 prior to 2018 in which Tesla did a deal, and it was a very
24 standard deal, where they hired bankers, hired lawyers. They
25 negotiated in the normal way. It was all done very standard,

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1 in a standard process.

2 Q. And this deal, the tweet, the taking private, the
3 go-private, the proposal, it did not follow the form of those
4 other transactions; is that correct?

5 MR. PRICE: Objection. This is leading.

6 THE COURT: Overruled.

7 A. That's correct.

8 BY MR. APTON

9 Q. I just want to make that clear.

10 It did not follow form of those other transactions;
11 correct?

12 A. Correct.

13 Q. And, Professor, one last question. There has been some
14 discussion about your research assistants. And I'd like to get
15 a better idea of how you conduct these engagements and how you
16 rely on your research assistants?

17 A. Well, in general, I have lots of excellent students at
18 Harvard, both Harvard Law School and Harvard Business School.
19 And after the course is over, I will sometimes pick one of the
20 most excellent students to work with me. It's helpful for
21 their learning and their overall career development.

22 And in this particular case I happened to have had a
23 student who was exceptional, unbelievably great student in my
24 Deals class. We studied MBOs in that Deals class, including
25 the Dell MBO. And I believe it was during the summer, maybe

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1 early in the fall, I asked him if he would be willing to help
2 me with the report, and he was thrilled. He was just starting
3 at his consulting firm, I believe, in January. The report was
4 due in November, so it was perfect timing.

5 And he worked with me on it. And I believe it was helpful
6 to him in terms of his learning, and he was exceptional,
7 exceptional as a research assistant.

8 Q. His name was, is it, Izosa?

9 A. I call him Izzy. I called him Izzy.

10 Q. That's his name, Izzy?

11 A. You know -- yes. I would be hesitant. I'd like to not
12 have his name in the record, if that's okay. I mean, I just
13 want to protect his privacy, but he was exceptional.

14 Q. Okay.

15 A. Former Navy Seal. One of the best students I've ever had
16 at Harvard Business School.

17 Q. Understood. Thank you, Professor. No further questions.

18 THE COURT: Thank you. Anything on recross?

19 MR. PRICE: No questions, Your Honor.

20 THE COURT: Thank you. This witness is excused then.

21 (Witness excused.)

22 THE COURT: Plaintiff may call its next witness.

23 MR. PORRITT: Your Honor, plaintiff calls Elon Musk.

24 THE COURT: All right.

25

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ELON MUSK,

called as a witness for the Plaintiff, having been duly sworn,
testified as follows:

THE WITNESS: I do.

THE CLERK: Thank you. Please have a seat.

Please speak clearly into the microphone. State and spell
your first and last name for the record please.

THE WITNESS: Elon Musk. E-L-O-N, M-U-S-K.

THE COURT: Thank you, Mr. Musk.

You may proceed.

MR. PORRITT: Thank you, Your Honor. I have a witness
binder here, one for the witness and one for the Court.

(Whereupon exhibit binder was tendered to the Court and
the witness.)

DIRECT EXAMINATION

BY MR. PORRITT

Q. Good afternoon, Mr. Musk.

A. Good afternoon.

Q. You are currently the Chief Executive Officer of Tesla?

A. Yes.

Q. And you also held that position in August of 2018;
correct?

A. Correct.

Q. And at that point you were also chairman of Tesla;
correct?

1 A. Yes.

2 Q. Now, you've had a Twitter account since 2010; is that
3 correct?

4 A. Since 2009.

5 Q. 2009, okay. And you understand that your Twitter account
6 has been identified by Tesla as the source of corporate
7 information; is that correct?

8 A. Yes.

9 Q. That's been the case since 2013; correct?

10 A. I assume so.

11 Q. And the Tesla board approved that decision?

12 A. Yes.

13 Q. And it's true that you got Twitter as part of your
14 interaction with retail investors?

15 A. Yes. I speak with retail investors quite frequently --
16 well, communicate with retail investors quite frequently on
17 Twitter. Yeah.

18 Q. And before you tweet something about Tesla, you think
19 about what effect it will have on retail investors; is that
20 correct?

21 A. Yes. I care a great deal about retail investors. They
22 are our most loyal and steadfast, I think, investors.

23 Q. And you want information that you tweet to reach your
24 millions of followers, including Tesla investors; isn't that
25 correct?

1 A. Yeah. I think it's the best way to communicate with
2 people. It's, I think, the most democratic way to communicate
3 with people and it gives all investors, no matter whether they
4 are big or small investors, equal access to information.

5 Q. And you're aware that your institutional investors also
6 follow you on Twitter; is that correct?

7 A. I assume so. I don't know.

8 Q. And so you frequently use your Twitter account to tweet
9 corporate information about Twitter -- about Tesla, sorry;
10 isn't that correct?

11 A. That is one of the things that I tweet about. Also me.

12 Q. And -- and Tesla itself does no conventional advertising;
13 is that correct?

14 A. Correct.

15 Q. Is it fair to say that your Twitter account is a primary
16 means of communication in raising brand awareness for Tesla?

17 A. I don't really think about brand awareness, but I -- I
18 think it is a good way to communicate about products and to
19 enter customer's support questions and to hear, you know, what
20 people think about the product and to get feedback for
21 improvement.

22 Q. And you're aware that Tesla's stock price sometimes goes
23 up or down following one of your tweets?

24 A. Well, it's difficult to say if that's -- the stock price
25 is linked to the tweet. I mean, there have been many cases

1 where I thought that if I were to tweet something, that the
2 stock price would go down.

3 I mean, for example, at one point I tweeted that I thought
4 that in my opinion the stock price was too high, and then the
5 stock price went down. So just because I tweet something does
6 not mean people believe it or will act accordingly.

7 I found it ironic that me saying that I thought the stock
8 price was too high, because I was concerned that people might
9 buy the stock at too high a price, and then ironically it went
10 down.

11 **Q.** But you're aware that --

12 **A.** I'm sorry. It didn't go down. It went up. I said I
13 thought the stock price was too high, and it went higher, which
14 is -- which is, you know, counterintuitive.

15 **Q.** But you're aware that sometimes after your tweet, the
16 stock price moves either up or down.

17 I'm not asking you to make a causal relationship. You
18 just -- you understand that happens?

19 **A.** Yes. What I'm trying to say is that the causal
20 relationship is clearly not there simply because of a tweet.
21 That's why I used the example of when I -- even though I said
22 that I tweeted that, in my opinion, the stock price was too
23 high, the stock price then went up from that. And you
24 obviously think if I tweeted -- you'd think that if I tweeted
25 the stock price was too high, the stock price would go down,

1 but it actually went up.

2 So, you know, correlation is not causation, but the tweets
3 don't -- you know, they aren't directly linked.

4 **Q.** And you're aware that your tweets about Tesla are governed
5 by the federal securities laws; correct?

6 **A.** Yes.

7 **Q.** And that even though Twitter is an informal medium, your
8 tweets about Tesla are the same as statements contained in a
9 Securities and Exchange Commission filing or formal corporate
10 press release?

11 **MR. SPIRO:** Objection. Compound. Calls for a legal
12 conclusion.

13 **THE COURT:** Overruled. You can answer the question.

14 **A.** Well, there is a limit to what you can say in a tweet
15 obviously. So you can put a lot more in a filing than you can
16 in a tweet.

17 **BY MR. PORRITT**

18 **Q.** But you understand that tweets are the same under the law,
19 under the federal securities laws?

20 **MR. SPIRO:** Same objection.

21 **THE COURT:** A tweet is the same as what?

22 **MR. PORRITT:** As an SEC filing or a press release.

23 **BY MR. PORRITT**

24 **Q.** I will rephrase the question.

25 You understand that a statement by you on Twitter about

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1 Tesla is a public statement in connection with Tesla's -- in
2 connection with Tesla stock in the same way or securities in
3 the same way that an SEC filing or press release is?

4 **A.** The tweets are information that I think the public should
5 hear.

6 **THE COURT:** Well, I don't think that answers the
7 question. Do you want to ask it one more time?

8 **BY MR. PORRITT**

9 **Q.** You understand that you're under the same obligation to be
10 accurate in a tweet about Tesla as you are in an SEC filing or
11 press release?

12 **A.** Yes. But, obviously, there is a limit, if you've got 240
13 characters, to what you can say. You can obviously be far more
14 verbose in a filing, and everyone on Twitter understands that.

15 **Q.** Nonetheless, the character constraints in Twitter does
16 not -- there is no exception under the SEC rules based on the
17 character limitation in Twitter, is there?

18 **A.** There isn't, but I think one cannot ignore the character
19 limitation, and everyone on Twitter is aware of the character
20 limitation.

21 **Q.** You don't -- when you're composing a tweet about Tesla, do
22 you think about whether you can accurately and fully and
23 truthfully communicate information in the constraints of
24 Twitter?

25 **A.** I think you can absolutely be truthful, but can you be

1 comprehensive? Of course not.

2 Q. Do you ever consider not tweeting something because you
3 can't contain its -- you can't completely explain it within the
4 context of a tweet, so it would be misleading for you to tweet
5 out some of the information?

6 A. I'm not sure I understand your question. It seems like
7 you're combining many questions in one.

8 Q. Okay. I will rephrase.

9 We're talking about the character constraints of Twitter;
10 correct?

11 A. Yes.

12 Q. And you -- as I understand the testimony, you've said
13 sometimes that prevents you from tweeting or disclosing all the
14 information; correct?

15 A. Well, there is a 240 character limitation.

16 Q. So if --

17 A. You can do multiple tweets obviously. Yeah.

18 Q. Have you ever thought about not tweeting something because
19 you thought it would be -- you wouldn't be able to fully
20 express it within the context of a tweet?

21 A. Yeah. I mean, there's things, like, for example, Tesla
22 safety blogs and whatnot, which are quite lengthy. And so, you
23 know, those are on our website.

24 Q. And you wouldn't want to put out a misleading selection or
25 something from something about their safety blogs; right?

1 A. Yes. But, I mean, I have tweeted about Tesla safety in
2 tweets, but the tweets are truthful. They are simply short.
3 I think you're trying to conflate misleading with short.

4 Q. And --

5 A. That's misleading.

6 Q. Well, the SEC has enacted rules regulating statements
7 about public companies; right?

8 A. The SEC makes rulings about public companies?

9 Q. About statements made about public companies; correct?

10 A. Yes, they do.

11 Q. And those rules apply to your Twitter account for
12 statements about Tesla; right?

13 MR. SPIRO: Objection. These questions call for legal
14 conclusions.

15 THE COURT: Overruled. You can answer.

16 A. Sorry. Can you repeat that?

17 BY MR. PORRITT

18 Q. The SEC rules about public statements regarding public
19 companies apply to your Twitter account in connection with
20 statements about Tesla; isn't that correct?

21 A. Yes.

22 Q. Okay. And you knew that in 2018?

23 A. Yes.

24 Q. In August of 2018 there was no practice for anyone at
25 Tesla to review your tweets before you published them; correct?

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1 A. I'm sorry. Can you talk closer to the microphone? It's a
2 little hard to hear.

3 Q. I apologize. How about that?

4 A. That's better, yeah.

5 Q. Okay. I'm often accused of speaking too loudly.

6 In August of 2018 there was no practice for anyone at
7 Tesla to review your tweets before you published them; correct?

8 A. Correct.

9 Q. And that was a policy approved by Tesla and its Board of
10 Directors?

11 A. Yes.

12 Q. So in 2018 none of your tweets were reviewed by anyone at
13 Tesla before you posted them; correct?

14 A. Well, I worked at Tesla, but besides me.

15 Q. You review your tweets before you post them?

16 A. I mean, I read my tweet, yes.

17 Q. Do you recall in July 2018 there was controversy involving
18 one of your tweets and an English diver and the cave rescue in
19 Thailand? Do you recall that?

20 A. He was not a diver.

21 Q. Do you recall that controversy?

22 A. I'm aware of that controversy.

23 Q. And you're aware that controversy on Twitter caused a
24 decline in Tesla stock price?

25 A. No. I think you're linking things on Twitter to Tesla

1 stock prices when they are not linked. That's why I gave the
2 example, even if I say on Twitter that I think the stock price
3 is too high, the stock price still goes higher.

4 **Q.** I will rephrase. I'll reask the question.

5 And this controversy about the cave rescue in Thailand was
6 followed by a negative impact on Tesla stock price?

7 **A.** No. I think you're creating a link that doesn't exist.

8 **Q.** Well, did Tesla stock price go down after you tweeted
9 about the Thai cave rescue?

10 **MR. SPIRO:** Objection. That day? That week? It's
11 vague.

12 **THE COURT:** Give a time frame.

13 **BY MR. PORRITT**

14 **Q.** Within the week after that controversy?

15 **A.** Well, Tesla stock price goes up and down all the time.
16 And I don't think that, you know, some tweet about something
17 completely unrelated to Tesla is going to have an effect on the
18 stock price. That's absurd.

19 **Q.** Do you recall in July 2018 being approached by Antonio
20 Gracias suggesting you take a break from Twitter after your
21 tweets about the cave rescue in Thailand?

22 **A.** I don't recall that. It was five years ago.

23 **Q.** Do you recall being advised in July 2018 by Ron Baron to
24 stop using Twitter?

25 **A.** No. Again, that was five years ago.

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1 **MR. PORRITT:** Your Honor, if I may show the witness
2 Exhibit 78 just to refresh his recollection?

3 **THE COURT:** All right. About a question you just
4 asked? This is about the question that you just asked about?

5 **MR. PORRITT:** Correct. Correct, Your Honor.

6 **THE COURT:** Okay.

7 (Whereupon document was tendered to the Court and the
8 witness.)

9 **BY MR. PORRITT**

10 **Q.** Can you please read to yourself Exhibit 78, Mr. Musk?

11 **THE COURT:** All of it or some portion of it?

12 **MR. PORRITT:** It's two -- it's just on the first --
13 it's really just the first page, about halfway down the first
14 page.

15 **THE COURT:** All right. So, Mr. Musk --

16 **THE WITNESS:** What are you referring to?

17 **THE COURT:** So read it to himself.

18 **MR. PORRITT:** Read to it himself, yes.

19 **THE COURT:** And then not refer to it afterwards.

20 **MR. PORRITT:** Not refer to it. I'm just asking if it
21 refreshes his recollection about whether Mr. Baron asked him --
22 asked the witness to take a break from Twitter.

23 Actually, I'll correct that. "Just don't use Twitter."

24 **A.** Yes, I read it.
25

1 **BY MR. PORRITT**

2 **Q.** Okay. Does this refresh your recollection that Ron Baron
3 suggested to you in July 2018 to "Just don't use Twitter"?

4 **A.** I mean, I can see that he -- he's not saying don't use
5 Twitter. He's -- he's saying I should not respond to criticism
6 in the news on Twitter.

7 **Q.** Did you follow --

8 **A.** Yeah.

9 **Q.** Did you follow Mr. Baron's suggestion to stop using
10 Twitter?

11 **MR. SPIRO:** Objection. Mischaracterizes the
12 testimony.

13 **THE COURT:** Sustained. That wasn't what the witness
14 said.

15 **BY MR. PORRITT**

16 **Q.** Do you know, who is Ron Baron?

17 **A.** Ron Baron is an investor. He's one of the best investors
18 in the world. A very wise, smart person.

19 **Q.** Do you recall in July 2018 Sam Teller providing feedback
20 from Tesla and SpaceX executives to you asking you take a break
21 from Twitter?

22 **A.** Again, that was five years ago. I don't recall it.

23 **MR. PORRITT:** Your Honor, if I may show the witness
24 Exhibit 104 to refresh his recollection?

25 **THE COURT:** Okay. It would be helpful if you direct

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1 the witness to a specific portion.

2 **MR. PORRITT:** I will.

3 (Whereupon document was tendered to the Court and the
4 witness.)

5 **MR. PORRITT:** Second paragraph in the document.

6 **MR. SPIRO:** Your Honor, we're not doing refreshing
7 recollection exactly how it's supposed to be done in my view.

8 But if the Court could just -- or if I could have a
9 standing objection to the way it's being done. Because the
10 witness is speaking from the document, which is obviously
11 not --

12 **THE COURT:** Well, all right. So what's supposed to
13 happen is if the witness doesn't remember something, he can be
14 presented with a document, read to himself, and then not read
15 from the document, just say whether it does refresh your
16 memory. And if it doesn't, that's it. If it does, then you
17 can say what you remember.

18 **MR. PORRITT:** I believe that's what I'm doing, but if
19 I'm falling down, I apologize.

20 **THE COURT:** All right. I just want to make sure we
21 follow the procedure.

22 So, Mr. Musk, if -- you're going to direct the witness to,
23 what, the first paragraph?

24 **MR. PORRITT:** It's the -- well, it's the second
25 paragraph in the document, which is an email chain. So it's

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1 that first block, if you like, large paragraph in the middle
2 there.

3 **THE COURT:** All right. You're going to have him read
4 that first indented block; right?

5 **MR. PORRITT:** Correct, Your Honor.

6 **THE COURT:** So, Mr. Musk, if you would just read that
7 to yourself. Then when you're done, you can look up.

8 **THE WITNESS:** Okay.

9 (Witness complied.)

10 **A.** Yes. It's saying that --

11 **THE COURT:** Now, that's where you -- you're not
12 supposed to recite that.

13 **THE WITNESS:** Oh, my apologies.

14 **THE COURT:** You're supposed to wait for the question
15 from Mr. Porritt.

16 **BY MR. PORRITT**

17 **Q.** I'll now ask, have you had a chance to review this, that
18 exhibit?

19 **A.** I have.

20 **Q.** Okay. Does this refresh your recollection that Sam Teller
21 in July 2018 asked you to take a break from Twitter?

22 **A.** It does.

23 **Q.** Okay. And do you recall investors also in July 2018
24 asking you to take a break from Twitter?

25 **A.** I mean, a lot -- I can say, like, 2018 was an eventful and

1 very difficult year. So, you know, we're sitting here five
2 years later. If you're asking me to recall one of several
3 thousand emails or texts, it's quite difficult. My memory is
4 simply not that good.

5 **Q.** I understand. That's why I'm trying to refresh your
6 recollection. I have to do this because -- I have to do this
7 this way for the reasons we just discussed.

8 One last thing on this, if I show the witness Exhibit 40
9 to refresh his recollection.

10 So please read this to yourself and let me know when
11 you've read it.

12 (Whereupon document was tendered to the Court and the
13 witness.)

14 **MR. SPIRO:** I would also like a standing objection to
15 relevance on any of this.

16 **THE COURT:** Overruled. But at some point there is a
17 403 question here, so I'd like to move on.

18 **MR. PORRITT:** This is the last one, Your Honor.

19 **THE COURT:** All right.

20 **BY MR. PORRITT**

21 **Q.** This is -- this is the month before the tweets in
22 question.

23 **A.** Yes, I see it. It does -- I actually -- I mean, like I
24 said, I get -- I truly have, like, a Niagara Falls of email,
25 you know. So it's really difficult to remember every email.

1 But, I mean, I -- does this refresh my recollection? Sure.

2 Q. Okay. So it refreshes your recollection that investors
3 were asking you to take a break from Twitter in July 2018, or
4 at least an investor?

5 A. I mean, the -- there's some -- I mean, we have many
6 thousands of investors. These are a few emails.

7 Q. Did you, in fact, take a break from Twitter in July 2018?

8 A. I don't think so.

9 Q. So you ignored the advice of Sam Teller and the Tesla
10 executives?

11 A. I suppose I continued to tweet, yes.

12 Q. You ignored the advice of your investor Joe Fath?

13 A. Yeah. I mean, like I said, we have many thousands of
14 investors. These are two emails out of probably 20,000
15 investors.

16 Q. During 2018 Tesla was dealing with the operational
17 challenge of the model -- scaling Model 3 production; is that
18 a fair summary?

19 A. Yes. 2018 was an extremely painful and difficult year.
20 I was sleeping in the factory to help make the factory work.

21 Q. So that was a big challenge, is that an understatement
22 perhaps?

23 A. That would be an understatement. The sheer level of pain
24 required to make Tesla successful in the '17 -- 2017 through
25 2019 period was excruciating for me and for many others. I

1 wasn't sleeping in the factory because I wanted to, but because
2 I had to.

3 **Q.** And, in fact, in the July 2018 Tesla shareholder meeting
4 you described the preceding month as "the most excruciating
5 hellish seven months I've maybe ever had." Does that sound
6 familiar?

7 **A.** That is an accurate statement. Extremely -- extreme pain.

8 **Q.** And you thought the -- your belief was that the stress of
9 this operational challenge was made worse by Tesla being a
10 public company with the stock; correct?

11 **A.** Yes, in addition to the executional challenges. I mean,
12 it is important to note that there has not been a successful
13 American car company to reach volume production in the United
14 States since Chrysler in the '20s. So it's been about 100
15 years since a car company was successful in reaching volume
16 production. The reason is because it is extremely difficult to
17 do so, and in Tesla's case we just barely succeeded in doing
18 so.

19 **Q.** And one of the issues caused by being a public company is
20 that you face pressure from so-called short sellers; is that
21 correct?

22 **A.** Yes. I -- I think most people don't know what a "short
23 seller" means. You know, it's sort of like -- sort of like a
24 -- is a sort of, you know, a seller of small stature, or is it
25 a -- like, medium and tall sellers, or what -- short sellers, I

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1 think it's maybe important for -- if I'll just explain.

2 A short seller is someone who is betting that the company
3 will -- will fail. A short seller is someone that wants the
4 company's stock to go down. And the best case scenario for a
5 short seller is if the company goes bankrupt.

6 So they -- the short seller is basically a bunch of sharks
7 on Wall Street wanted Tesla to die, very badly.

8 Q. And then short sellers, of course, lose money when the
9 stock price goes up; isn't that correct?

10 A. If they exit their short position, they lose money.

11 Q. And you had several public -- made several public
12 criticisms of short sellers during 2018; is that correct?

13 A. Yes. I believe short selling should be made illegal. It
14 is a means of -- for, in my opinion, bad people on Wall Street
15 to steal money from small investors.

16 Q. And --

17 A. Not good.

18 Q. And short sellers attack companies like Tesla by putting
19 negative stories in the press; isn't that correct?

20 A. Yes. Short sellers, meaning sellers, people who want
21 Tesla to die, will engage in what's called an FUD campaign, a
22 fear, uncertainty and doubt campaign, where they will plant
23 false stories in the media in order to get the stock to go down
24 and do anything in their power to make a company die. It's
25 evil.

1 Q. And you had publicly stated prior to August 2018 that you
2 wish Tesla was a private company; isn't that correct?

3 A. Yes. If you're a private company, then private companies
4 cannot be -- cannot be sold short. So short sellers are unable
5 to attack a private company because private companies can be --
6 cannot be short sold, and this -- this makes it much easier to
7 execute and get things done.

8 So like SpaceX, my rocket company, is private and is not
9 subject to short seller attacks.

10 MR. SPIRO: Your Honor, we're having an issue with the
11 real time. I don't know if there is a way to reboot.

12 THE COURT: I have been having that problem. The
13 problem is -- well, we're almost at 2:00 o'clock. It would
14 take about ten minutes to fix it, so I have been living without
15 it.

16 MR. SPIRO: I don't want to waste the jury's time.

17 MR. PORRITT: I have got a natural stopping point in
18 about seven more questions.

19 THE COURT: Why don't we do that? We'll fix it by
20 Monday.

21 MR. SPIRO: Thank you, Your Honor.

22 BY MR. PORRITT

23 Q. In fact, do you recall telling *Rolling Stone* magazine in
24 November 2017 that Tesla would be more efficient as a private
25 company?

1 **A.** I don't recall that exact thing, but I certainly feel that
2 way.

3 **Q.** Okay. And being -- but being public, being a public
4 company has brought some benefits for Tesla though; correct?

5 **A.** There are pros and cons to being a public, so there are
6 some benefits to being a public company.

7 **Q.** Okay. One of those benefits is raising millions of
8 dollars from the capital markets and the public by selling
9 shares to the public?

10 **A** No. That is something that both private companies and
11 public companies can do. SpaceX -- I mean I have two, two main
12 companies that I run. And where I'm essentially the chief
13 technologist and product person. And they're rough- -- they're
14 of comparable magnitude. And you've got SpaceX on the one hand
15 which is private and is not subject to short-seller attacks,
16 and you have got Tesla which is public and is subject to
17 short-seller attacks. But both SpaceX and Tesla have been able
18 to raise billions of dollars. So being private does not
19 prevent you from raising money.

20 **Q** No. And I didn't suggest the opposite. But as a public
21 company, you -- Tesla has successfully raised billions of
22 dollars, correct?

23 **A** Correct. But SpaceX also, as a private company, has
24 raised billions of dollars.

25 **Q** And you're involved in all those financings done by Tesla

1 as a public company, correct, as CEO?

2 **A** Yes.

3 **Q** Okay. And you worked with Tesla's bankers and lawyers in
4 connection with those financings?

5 **A** Yes.

6 **Q** Okay. And with their help and advice, you filed lengthy
7 legal documents with the SEC before sending your shares to the
8 public?

9 **MR. SPIRO:** Objection. "You"?

10 **BY MR. PORRITT**

11 **Q** Before Tesla sold its shares to the public?

12 **A** Yes. As a public company, you must do public filings when
13 selling shares.

14 **Q** And you developed those filings with the advice of bankers
15 and lawyers?

16 **A** Actually, most of the time we don't use bankers for our --
17 well, we -- bankers are not necessary for public financings.

18 **Q** Yeah, but the banks, such as Goldman Sachs, didn't
19 underwrite many of your public offerings of shares?

20 **A** It is optional to use bankers for raising money. It is
21 not required.

22 **Q** Okay. But Tesla, in fact, used bankers to help it raise
23 money.

24 **A** Yes.

25 **Q** Okay.

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1 **MR. PORRITT:** Your Honor, I think I might -- it's
2 2:02, by my watch, so --

3 **THE COURT:** All right. This is a convenient stopping
4 point. Then we will adjourn for the day, and we will resume
5 Monday morning at 8:30.

6 Just a reminder to the jury, please do not speak with
7 anyone at all about this case. Do not read or listen or do any
8 kind of research about this case. And do not form any opinions
9 until this case is submitted to you for deliberation.

10 Until then, have a great weekend.

11 **THE MARSHAL:** Hang on, one second. We've got to let
12 the witness --

13 **THE COURT:** All right, we'll let the witness leave
14 first, and then everyone else will exit afterwards.

15 Go ahead, Mr. Musk.

16 **THE WITNESS:** Thank you.

17 (Witness excused)

18 **THE COURT:** Okay. Now we can excuse the jurors.

19 **THE COURTROOM DEPUTY:** All rise for the jury.

20 (Jury excused)

21 **THE COURT:** All right. One thing I did want to raise,
22 we still have this outstanding matter of Exhibit 80, the PIF
23 notes.

24 **MR. PORRITT:** Yes, Your Honor.

25 **THE COURT:** And since that is likely to come up, you

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1 are going want to raise that with this witness, I take it?

2 **MR. PORRITT:** Um, potentially, Your Honor, yes. So I
3 don't know how you want to go forward. We (Inaudible) podium
4 about the Exhibit 80 expert, I'm afraid. So if I may, I'm
5 happy to cede the podium.

6 **THE COURT:** All right. Let me give you my preliminary
7 views, and then you can take it from there.

8 **MS. TRIPODI:** Your Honor, we do have the message from
9 Akin Gump who submitted the minutes to the SEC from the PIF.
10 And there's also a text message from Yasir that will be put in,
11 I believe, in Exhibit 121, referencing that the July 31st
12 meeting was, in fact, minuted by the PIF. And if you can give
13 me a moment, I can point to you in 121 to that.

14 **THE COURT:** Okay. Before we get into the actual
15 evidence, let me tell you what my view is. First of all,
16 there's the authenticity issue. And as I indicated, just on
17 its face, it's not sufficiently self-authenticating. It would
18 require something akin to some kind of chain of custody, so
19 that there's reasonable assurance about where this document is,
20 and it's a genuine document, et cetera, et cetera.

21 If you get by that, then the question is, is it admissible
22 as an exception to hearsay, or how do you deal with the hearsay
23 rule. The first instinct is, of course, business records under
24 803(6). And my view is that you would have to meet the
25 requisites of 803(6), showing that these are indeed

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1 contemporary notes, taken by somebody who -- with knowledge,
2 et cetera, and this record is kept in the course of regular
3 business, et cetera, et cetera. Normally you have a custodian
4 or somebody familiar with the company do that. It's often
5 perfunctory, but it seems, to me, necessary.

6 If you don't have that person, and you have cited 807, the
7 residual exception rule -- and the key there is that there has
8 to be sufficient guarantees of trustworthiness, and under --
9 considering the circumstances under which it was made, and if
10 there's any evidence of corroborating the statement.

11 So, um, we started talking about this a little bit
12 earlier. Sounds like you may have some corroboration that in
13 fact there was a meeting on this date; it did take place. The
14 people present, as noted, were present.

15 One question is: Is there any corroborating evidence of
16 the contents? That is, is what is stated in 80, is that
17 corroborated by somebody there, in some way? Because if it is,
18 then you're scoring some points on the 807 front.

19 **MS. TRIPODI:** Your Honor, I think there is a general
20 corroboration regarding the topics that were discussed in the
21 meeting. I'm sure Mr. Spiro will point out that the account of
22 what has occurred by PIF differs in part from what his
23 witnesses are going to present, which is not surprising, I
24 don't think, to anyone that the Tesla witnesses would have a
25 different account than the PIF witnesses might. But there was

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1 some substance in the meeting that did overlap with
2 conversations that took place and had been testified by the
3 witnesses.

4 So if it would be helpful to Your Honor, we could put
5 together something short -- nothing long, I understand, we
6 don't -- I promise Your Honor, we're not going to make a very
7 long submission. But if we were given the opportunity to do
8 that, and also to present something with respect to the chain
9 of custody, which of course we'll present to counsel.

10 **THE COURT:** All right.

11 **MR. SPIRO:** May I respond briefly, Your Honor?

12 **THE COURT:** Yes, you may.

13 **MR. SPIRO:** This is a frivolous application to admit
14 this exhibit. There is zero authenticity. Zero. She's
15 talking about an email from an Akin Gump lawyer. That's not
16 authenticity in a federal courtroom. There's -- if there's
17 zero basis of authenticity --

18 **THE COURT:** Well, the email explains where it came
19 from, you know -- I don't know what it says, but I could
20 imagine an email -- was Akin Gump counsel for PIF?

21 **MS. TRIPODI:** Yes, they were, in conjunction with the
22 SEC investigation. So it's a message -- it's not an email,
23 it's a letter transmitting the PIF minutes. This was produced
24 in the course of the litigation. So it's an email -- I'm
25 sorry. Rather, it's a letter from Akin Gump to the SEC, with

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1 the PIF minutes attached.

2 **MR. SPIRO:** A cover letter from a lawyer is a way to
3 authenticate an exhibit in Federal Court?

4 **THE COURT:** Well, from the lawyer, the lawyer of the
5 alleged principal here, of the document.

6 **MR. SPIRO:** Then why does anybody -- if that were the
7 case, and it's not, why would anybody ever call the business
8 record custodian?

9 **THE COURT:** Because you're risking -- if you want to
10 get a document in and you want to do that, and -- you may lose.
11 That's one reason why you do it.

12 **MR. SPIRO:** Correct --

13 **THE COURT:** It doesn't mean it can't be done.

14 **MR. SPIRO:** Well, I would submit there is no support
15 in the law, none, for --

16 **THE COURT:** Okay. Well, let's do this. We can argue
17 until the cows come home. I'm not interested in arguing right
18 now. I want to see the evidence, and then you can argue from
19 the evidence.

20 I'm just telling you, my standard is based in the rule.

21 **MR. SPIRO:** Right.

22 **THE COURT:** And the rule, there is a residuary -- a
23 residual exception rule. But I'm going to look at it, to look
24 at whether it has sufficient guarantees of trustworthiness
25 and -- and authenticity. I may conclude that it's not. But

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1 I'm not going to -- I can't sit here now and say it can't be
2 met.

3 **MR. SPIRO:** So the point I'm trying to simply make is
4 the residual exception is the hearsay component. The problem
5 that is fatal, the reason this can't get off the ground, is the
6 authenticity argument. The best that they have is, again,
7 apparently four years ago, a cover letter from a lawyer. We
8 don't even know that this isn't minuted by a lawyer. We don't
9 know who wrote it. We don't know when they wrote it. There's
10 not even a date on this that suggests it wasn't made well after
11 the fact. This was at a time when they were trying to not meet
12 with the SEC. The minutes are completely self-serving.

13 There's no indicia of reliability, whatsoever, and there's
14 no authenticity, because -- there just isn't. Authenticity is
15 a very technical thing. We don't even know who did this.

16 **THE COURT:** Well, let's do this. You should submit to
17 counsel what you're going to submit to the Court so they have a
18 chance to comment. So when we get here first thing Monday
19 morning we'll meet at 8:00 to review what the evidence is, and
20 you'll have a chance to comment.

21 And if you have some counter evidence you should share
22 with them, and I will review it at the time and see if the
23 legal standards as I understand them are met or not met.

24 **MR. SPIRO:** Understood. Thank you, your Honor.

25 **MS. TRIPODI:** Thank you, Your Honor.

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1 **THE COURT:** I just want to lay out, that's the legal
2 framework, as I see it. Authenticity is a front-door question.
3 If you can't get past that door. There's nothing to talk
4 about. If you do, then there's a hearsay question, 803(6) or
5 807; I don't see another -- the present sense, I don't buy that
6 one.

7 **MR. SPIRO:** Thank you, Your Honor.

8 **MS. TRIPODI:** Thank you, Your Honor.

9 **THE COURT:** Before we adjourn, I'm going to issue,
10 just to formalize the record on all the things that we talk
11 about, the table. We'll get to the table with the sustaineds
12 or overruleds, so you'll have a record of what we've done. A
13 lot of that's already water under the bridge, but just in case.
14 But.

15 In terms of the depo transcripts that you're going to
16 introduce I guess after the next witness, I've already
17 indicated -- and you'll get this in your ruling -- that I'm
18 overruling pretty much the objections.

19 **MR. SPIRO:** Yes, Your Honor. And on that, not to get
20 the final note of the day, but I'd asked the Court earlier if
21 we could sort of wholesale speak to the objections. And the
22 Court noted, in reviewing the deposition, it's -- it's
23 trickier, frankly, than going exhibit by exhibit, because it's
24 not clear always when a witness is talking about one thing
25 versus another.

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1 But in Brinkman's testimony, our understanding was that
2 when you said on January 18th, at Line 286 (sic) that it's not
3 relevant if an analyst was to do something after the class
4 period because, quote, that's almost like expert testimony, the
5 kind of expert testimony --

6 **THE COURT:** Right. So let's --

7 **MR. SPIRO:** -- that invades the providence of the jury
8 that is coming from a source not designated expert, so the
9 effect of the listener doesn't fly --

10 **THE COURT:** Right. So let's talk about that issue.
11 So anything that is done, I think, after, it's harder to see
12 effect on the listener.

13 Number two, some of this stuff is private and never --
14 this is pre- -- this is not the actual publication. Some of
15 the things he is talking about is his impressions, his
16 understanding why he changed the target price, et cetera,
17 et cetera. That seems to me relevant, as what I will shorthand
18 call it, sort of slice of the market. This is a sampling of,
19 you know, the public.

20 Now, it does begin to get into the area of, well, you
21 know, is he essentially serving as a *de facto* expert, even
22 though he hasn't been designated as such. And that's where the
23 701 comes in. Is he able to give opinions as somebody in the
24 marketplace, about how he interpreted, and his reaction to the
25 tweets, and the following tweets, and what happened.

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1 And it seems to me that in a case, in a securities case,
2 it is appropriate if he begins to rely on -- there's a shade
3 there between 701 and 702/703. If he begins to rely on
4 specialized training, expertise and knowledge, we get close to
5 that area. But I will note that he's given a deposition in
6 this case.

7 And so what is normally done, if it was a designated
8 expert, the whole point is you -- you disclose, you give a
9 summary. And you get to take the expert's deposition, and you
10 prepare.

11 So at least in spirit, if he's been thoroughly questioned
12 on the things he's going to be -- I mean, in fact this is the
13 -- it's the deposition -- then it seems to me that that puts
14 less of a premium in trying to draw the line between 701 and
15 702.

16 **MR. SPIRO:** I understand the Court's indicative ruling
17 as to that. That's very clear.

18 We viewed the Court's previous ruling, and as the Court
19 said, and I think my adversary agreed that it had some -- we
20 took it at least to have precedential effect in the case as
21 evaluating this, that his Exhibits 23, 24 and 25 within the
22 depo, which are related to analyst reports and the aftermath
23 well after the class period, would not be coming in. We
24 understood that, clear as day.

25 So I would just ask the Court -- I don't need a lengthy

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1 colloquy on this -- to -- that's what we want to draw the
2 Court's attention to. Because that's how we interpret --

3 **THE COURT:** And that's a fair question. Because my
4 initial reaction is that at least under the effect on the
5 listener rule, it doesn't really make it. Right? It only
6 comes in under what I've just called sort of sampling of the --
7 you know, sort of sampling of the --

8 **MR. SPIRO:** Right --

9 **MR. PORRITT:** I think we've withdrawn any designation.
10 I think we stop at August 20, which is that final report.
11 Which is the next trading day after the class period. So --

12 **MR. SPIRO:** Well, but that's -- there's a reason. In
13 fact, there was a motion in limine where the Court couldn't
14 have been clearer.

15 And again, it's after the class period. The Court we took
16 to already have ruled on this issue, so we would -- we would
17 ask to rely only that. And again -- you know, these reports,
18 they have hearsay within hearsay. So does the PIF minutes by
19 the way, has hearsay within -- we're nowhere near that, but I'm
20 just referencing that just so the Court's aware.

21 The analyst reports, they have multiple authors. There's
22 multiple reasons. It's -- in our judgment, you know, on shaky
23 ground, even as it were. But after the class period, we took
24 the Court to be saying: No, then you don't even have an
25 exception of an effect on the listener. You know, there's no

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1 testimony from any witness in this case they saw that analyst
2 report; there's no testimony in this case that that analyst
3 report moved the market. There is no basis or relevance to
4 that analyst report that happens after the class period.

5 **THE COURT:** So at this point, we're just talking about
6 Exhibit 23, because 24 and 25 have been withdrawn.

7 **MR. SPIRO:** Right. But then, again, we took the
8 withdrawal and the Court's ruling, again, just, no testimony
9 regarding them either, of course.

10 **MR. PORRITT:** Sorry, no testimony --

11 **MR. SPIRO:** Regarding that. Right? If you're going
12 to say that something's not relevant in document form --

13 **THE COURT:** Right, there's -- there's concomitant
14 testimony that goes along with that, that would have to be
15 looked at if I were to say it isn't.

16 **MR. SPIRO:** Agree.

17 **MR. PORRITT:** We've withdrawn the testimony, I think,
18 relating to Exhibit 24. Certainly to 25. So 25 is out.

19 **THE COURT:** 23 and related testimony is what we're
20 talking about.

21 **MR. PORRITT:** Correct. Which he drafted over the
22 weekend. Ryan Brinkman was deposed at length on this. He is
23 the author of this. He explained that.

24 He explain how he worked on the weekend, after -- you
25 know, starting on the 17th within the class period, and working

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1 through the weekend. He couldn't get it in time to publish it
2 within the class period, so he published it first thing on
3 Monday morning. It's as close -- it's as adjacent to the class
4 period as you can get.

5 **THE COURT:** All right. But in terms -- it's critical
6 when it's published, if you're relying on the effect of
7 listener. You may have planned it, you may have drafted it,
8 but it's when it's published, because if it is not published at
9 the close of the class, then you'd have to come up with some
10 creative argument why effect on the listener post-class, so
11 that's why --

12 **MR. PORRITT:** It's --

13 (Multiple speakers)

14 (Reporter clarification)

15 **THE COURT:** All right. And that's why I said, whether
16 you call it sampling of the market, slice of the market,
17 representative of the market, that's the only rationale for
18 that one. So, it is on thinner ice.

19 And I know I already made a ruling, but I've had a second
20 look. And now my tentative view is that it does come in for
21 that purpose. I will take one more look at it over the
22 weekend, and --

23 **MR. SPIRO:** I appreciate that, Your Honor.

24 **THE COURT:** -- if I say it stands, it stands. If I
25 say no I will let you know, and you can excise that, and you

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1 may have to excise some, a couple, a few pages.

2 **MR. SPIRO:** We appreciate the Court taking a look at
3 that. We understood the Court that it was on very thin ice.
4 And given that it was already on thin ice, we think the
5 probative value versus the prejudice, and we would ask the
6 Court to exclude it in the testimony about it.

7 Thank you very much.

8 **THE COURT:** All right. The other thing I will say is
9 that a lot of these things are being overruled on the basis of
10 effect on the listener. I think I said this in my sort of
11 overview about certain things, to the extent that it reflects
12 on Mr. Musk's state of mind at the time, et cetera, et cetera.

13 If there are such documents, I'm going to rely on the --
14 any opposing party to ask for a limiting instruction. I don't
15 intend to give it every time, but -- I'm not necessarily going
16 to do it *sua sponte*. But if either side wants a limiting
17 instruction, the burden is on you to ask for it.

18 **MR. SPIRO:** Yeah. We, most respectfully, don't want
19 one because we think it will have zero effect here. As the
20 Court is aware, in their opening statement, they made comments
21 about the PIF text messages, just to use that example, and, and
22 analysts reports from JP Morgan that made it clear as day their
23 intention is to use it as affirmative evidence. That limiting
24 instruction will wash away under that repetition. And that's
25 the real reason they're using it. And so the Court should look

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1 at that, I think, as well.

2 And also I think Mr. Porritt -- it may have been a slip of
3 the tongue, but at one point he sort of said that was what they
4 were using it for.

5 So, in any event, I thank the Court for its time.

6 **THE COURT:** All right.

7 **MR. PORRITT:** Thanks, Your Honor.

8 **THE COURT:** I want to make sure -- you know, I'm not
9 going to do stuff spontaneously -- precisely that. You may not
10 want me to give it, so I'm not going to give it unless you ask
11 me to give it. Okay?

12 **MR. PORRITT:** Thank you, Your Honor.

13 **MR. SPIRO:** Have a nice weekend.

14 **THE COURT:** Thank you, Your Honor.

15 **THE COURTROOM DEPUTY:** Court is adjourned.

16 (Proceedings concluded)
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CERTIFICATE OF REPORTERS

We, BELLE BALL and DEBRA PAS, Official Reporters for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. We certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Belle Ball

Belle Ball, CSR 8785, CRR, RDR

Saturday, January 21, 2023